

No. 10936

United States
Circuit Court of Appeals
For the Ninth Circuit.

GEORGE S. GAYLORD,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

GERTRUDE H. GAYLORD,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of the Record
In Two Volumes
VOLUME I
Pages 1 to 303

Upon Petitions to Review Decisions of the Tax Court
of the United States

FILED

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FEB 23 1945

PAUL P. O'BRIEN,
CLERK

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GEORGE S. GAYLORD,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES:

For Taxpayer:

THOMAS A. G. DOCKWEILER
JAMES W. BONTEMS, C.P.A.

For Comm'r:

BYRON M. COON

Docket No. 109138

GEORGE S. GAYLORD,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1941

Nov. 10—Petition received and filed. Taxpayer notified. Fee paid.

Nov. 10—Copy of petition served on General Counsel.

Dec. 9 —Answer filed by General Counsel.

Dec. 9 —Request for hearing in Los Angeles filed by General Counsel.

Dec. 11 —Notice issued placing proceeding on Los Angeles calendar.

Answer and request served.

1943

Feb. 18—Hearing set March 29, 1943 in Los Angeles, California.

Mar. 17—Application for subpoena to Bruce E. Bassett, Paul A. Martin, Mrs. Dyson Jackson, Harry E. Hudson and Jacob Braufman filed by General Counsel. 3/17/43 subpoenas (5) issued.

Apr. 2,3—Hearing had before Judge Turner on merits. Submitted. Appearance of James W. Bontems, C.P.A. filed. Petitioner's brief due June 2, 1943, respondent's—July 2, 1943. Petitioner's reply 7/17/43.

Apr. 12—Stipulation re exhibits filed at Los Angeles.

Apr. 20—Transcript of hearing of April 2, and 3, 1943 filed.

June 2—Brief filed by taxpayer. 6/2/43 copy served on General Counsel.

July 2 —Reply brief filed by General Counsel. Served 7/3/43.

Aug. 2—Motion for leave to file reply brief, reply brief lodged, filed by taxpayer. 8/2/43 granted.

Aug. 5—Copy of motion and reply brief served on General Counsel.

1944

Feb 18—Findings of fact and opinion rendered. Turner, Judge, Div. 8. Decision will be entered under Rule 50. 2/18/44 copy served.

1944

- Mar. 17—Motion for reconsideration of decision promulgated 2/18/44 filed by taxpayer. 3-18/44 Denied.
- May 17—Computation for entry of decision filed by General Counsel.
- May 17—Hearing set 6/21/44 on settlement.
- June 19—Consent to settlement filed by taxpayer.
- July 13—Revised computation of deficiency filed by General Counsel.
- Aug. 2—Consent to settlement filed by taxpayer.
- Aug. 4—Decision entered—Turner, J., Div. 8.
- Sept. 30—Motion to fix amount of bond filed by taxpayer.
- Oct. 2—Order fixing amount of bond at \$70,000.00 entered.
- Oct. 6—Bond in the amount of \$70,000.00 approved and ordered filed.
- Oct. 11—Petition for review by U.S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.
- Oct. 11—Proof of service filed by taxpayer.
- Nov. 13—Agreed statement of evidence filed.
- Nov. 13—Agreed praecipe for record filed.
- Nov. 22—Certified copy of order from U.S. Cir. Ct. of Appeals, 9th Ct. extending time to Dec. 30, 1944 to prepare & transmit record filed. [1*]

*Page numbering appearing at top of page of original certified Transcript of Record.

George S. Gaylord vs.

APPEARANCES

For Taxpayer:

THOMAS A. J. DOCKWEILER, Esq.,
JAMES W. BONTEMS, C.P.A.

For Comm'r:

BYRON M. COON, Esq.

Docket No. 109273

GERTRUDE H. GAYLORD,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1941

Nov. 26—Petition received and filed. Taxpayer notified. Fee paid.

Nov. 26—Copy of Petition served on General Counsel.

1942

Jan. 2—Answer filed by General Counsel.

Jan. 2—Request for hearing in Los Angeles filed by General Counsel.

Jan. 7—Notice issued placing proceeding on Los Angeles, Cal., calendar. Service of answer and request made.

1943

Feb. 18—Hearing set March 29, 1943, in Los Angeles, California.

1943

- Mar. 17—Application for subpoena to Bruce E. Bassett, Paul B. Martin, Mrs. Dyson Jackson, Harry E. Hudson and Jacob Braufman filed by General Counsel. 3/17/43 subpoenas (5) issued.
- Apr. 2, 3—Hearing had before Judge Turner on merits. Submitted. Appearance of James W. Bontems, C.P.A. filed. Petitioner's brief due 6/2/43. Respondent's 7/2/43—petitioner's reply 7/17/43.
- Apr. 12—Stipulation re exhibits filed at Los Angeles.
- Apr. 20—Transcript of hearing of April 2 and 3, 1943 filed.
- Jun. 2—Brief filed by taxpayer. 6/2/43 copy served.
- Jul. 2—Reply brief filed by General Counsel.
- Aug. 2—Motion for leave to file reply brief, reply brief lodged, filed by taxpayer. 8/2/43 granted.
- Aug. 5—Copy of motion and reply brief served on General Counsel.

1944

- Feb. 18—Findings of Fact and opinion rendered, Turner, J. Div. 8. Decision will be entered under Rule 50. 2/18/44 copy served.
- Mar. 17—Motion for reconsideration of decision promulgated 2/18/44 filed by taxpayer. 3/18/44 denied.
- May 17—Computation for entry of decision filed by General Counsel.

1944

May 17—Hearing set 6/21/44 on settlement.

Jun. 19—Consent to settlement filed by taxpayer.

Jul. 14—Decision entered, Bolon B. Turner J. Div.
8.

Sep. 25—Motion to fix amount of bond filed by taxpayer. 9/25/44 order fixing amount of bond in the amount of \$12,500.00 entered.

Oct. 2—Bond in the amount of \$12,500.00 approved and ordered filed.

Oct. 11—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.

Oct. 11—Proof of service filed by taxpayer.

Nov. 13—Agreed statement of evidence filed.

Nov. 13—Agreed praecipe for record filed.

Nov. 22—Certified copy of order from U. S. Cir.
Ct. of Appeals, 9th Ct. extending the time to 12/30/44 to prepare and transmit record filed. [2]

United States Board of Tax Appeals

Docket No. 109138

GEORGE S. GAYLORD,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above named petitioner hereby petitions for

a redetermination of the deficiency set forth by the commissioner of Internal Revenue in his notice of deficiency LA:IT:90D:PB, dated Sep 17 1941, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual with his residence at No. 639 Rosemont Avenue, Pasadena, California. The returns for the periods here involved were filed with the Collector for the Sixth District of California at Los Angeles, California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on the 17th day of September, 1941.

3. The taxes in controversy are income taxes for [3] the calendar years 1936, 1937, 1938 and 1939 and in the amount of \$49,518.76.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(I) The Commissioner of Internal Revenue (hereinafter for brevity referred to as "Commissioner") erred in determining that there was or is an income tax liability of the petitioner in the sum of \$27,486.36 or any other sum or amount whatsoever on or with respect to the or any income of the petitioner for the year 1936.

(II) The Commissioner erred in determining that there was or is a deficiency of \$17,835.82 or any other sum or amount whatsoever in or with respect to any such tax liability or that there was or is any deficiency or unpaid tax or liability therefor of the petitioner on or with respect to his income for the year 1936.

(III) The Commissioner erred in determining that there was or is an income tax liability of the petitioner in the sum of \$21,690.34 or any other sum or amount whatsoever on or with respect to the or any income of the petitioner for the year 1937.

(IV) The Commissioner erred in determining that there was or is a deficiency of \$12,033.50 or any other sum or amount whatsoever in or with respect to any such tax liability or that there was or is any deficiency or unpaid tax or liability therefor of the petitioner on or with respect to his income for the year 1937. [4]

(V) The Commissioner erred in determining that there was or is an income tax liability of the petitioner in the sum of \$17,188.72 or any other sum or amount whatsoever on or with respect to the or any income of the petitioner for the year 1938.

(VI) The Commissioner erred in determining that there was or is a deficiency of \$10,442.62 or any other sum or amount whatsoever in or with respect to any such tax liability or that there was or is any deficiency or unpaid tax or liability therefor of the petitioner on or with respect to his income for the year 1938.

(VII) The Commissioner erred in determining that there was or is an income tax liability of the petitioner in the sum of \$15,533.84 or any other sum or amount whatsoever on or with respect to the or any income of the petitioner for the year 1939.

(VIII) The Commissioner erred in determining

that there was or is a deficiency of \$9,206.82 or any other sum or amount whatsoever in or with respect to any such tax liability or that there was or is any deficiency or unpaid tax or liability therefor of the petitioner on or with respect to his income for the year 1939.

(IX) The Commissioner erred in determining that there was or is a total liability of \$81,899.26 or any other sum or amount whatsoever of the petitioner on or with respect to his income in or for the years 1936, 1937, 1938 and 1939 or any thereof. [5]

(X) The Commissioner erred in determining that there was or is a total deficiency of \$49,518.76 or any other sum or amount whatsoever on or with respect to the income taxes or any income tax or income tax liability of the petitioner on or with respect to the income of the petitioner for the years 1936, 1937, 1938 and 1939 or any of said years.

(XI) The Commissioner erred in determining or holding that the net income as adjusted for the taxable years 1936, 1937, 1938 and 1939 or for any of said years or any net income for said years or any thereof of the trust created by the declaration of trust dated November 7, 1935, made by George S. Gaylord and his wife Gertrude H. Gaylord, of which trust the petitioner and his said wife are first named trustees and their two daughters Margaret Gaylord Ruppel and Gertrude Gaylord (now Gertrude Gaylord Bruce) are two of the beneficiaries of said trust, constitutes or constituted or

is or ever was income of the petitioner and his said wife or either of them as grantors or grantor under the provisions of Section 22 (a), 166 and 167 of the Revenue Acts of 1936 and 1938 and of the Internal Revenue Code or under any of said provisions, or otherwise, or at all.

(XII) The Commissioner erred in determining or holding that 5/7ths or any other part of the net income of said trust as adjusted for each of the years 1936 to 1939, inclusive, or for any of said years, or any net income of said trust should be included in the recomputation or compu- [6] tation of the petitioner's taxable net income for the years 1936 to 1939, inclusive, or for any of said years.

(XIII) The Commissioner erred in determining or holding that for the purpose of computing the capital gains realized by said trust in the years 1936, 1937, 1938 and 1939 or in any of said years or the capital gains allegedly realized by the petitioner in the years 1936, 1937, 1938 and 1939 or any of said years from the sale of shares of the common capital stock of Marathon Paper Mills Company the statutory basis for computing gain or loss on each such sale was or is \$2.83542 per share instead of \$8.21 per share as stated in the income tax returns of said trust filed and in determining the statutory basis for computing gain or loss on each such share to be any sum or amount whatsoever less than \$10.988.

(XIV) The Commissioner erred in determining or holding that for the purpose of determining the statutory basis for computing gain or loss on each

or any such sale the fair market value of the 435 shares or any number of shares of the common stock of Menasha Printing and Carton Company received by the petitioner on or about August 15, 1917, or of any of said shares, in exchange for stock of Menasha Carton Company was or is \$100.00 per share or any other sum or amount whatsoever less than \$296.194 per share.

(XV) The Commissioner erred in determining or holding that while the petitioner's statutory basis for gain or loss upon the sale or other disposition of the bonds and [7] stock of Marathon Paper Mills Company received by the petitioner on or about October 31, 1927, in exchange for 3357 shares of the common stock of Menasha Printing and Carton Company is the same as the petitioner's basis in the shares given in that exchange, such basis should be apportioned 53.9967% to the bonds and 46.033% to the stock received in that exchange or should be apportioned at any other percentage than 54.21% to the bonds or than 45.79% to the stock received in that exchange.

(XVI) The Comissioner erred in determining (see Adjustments to Net Income Taxable Year Ended December 31, 1936, in said notice of deficiency) that there was or is additional income in the amount of \$39,271.98 or any other sum or amount whatsoever.

(XVII) The Commissioner erred in determining (see under same heading in said notice) that there was or is income from trust in the amount of \$31,-290.73 or any other sum or amount whatsoever.

(XVIII) The Commissioner erred in determining (see under same heading in said notice) that there was or is capital gain in the amount of \$7,981.25 or any other sum or amount whatsoever.

(XIX) The Commissioner erred in determining (see under same heading in said notice) that there was or is total net income of \$92,051.12 or total net income adjusted of \$91,806.12 or total net income or total net income adjusted [8] of or in any other sum or amount whatsoever in excess of \$52,534.14.

(XX) The Commissioner erred in determining (see Explanation of Adjustment for taxable year ended December 31, 1936, in said notice of deficiency) that the portion of the income of what the Commissioner in his said notice of deficiency refers to as the "Gaylord Trust" held to be taxable to the petitioner was or is \$31,290.73 or any other sum or amount whatsoever, and in determining that any portion of the income of said Gaylord Trust is taxable to the petitioner.

(XXI) The Commissioner erred in determining (see said Explanation of Adjustments in said notice of deficiency) that there was or is addition to income by increase in capital gain in amount of \$6,749.50 or any other sum or amount whatsoever and in determining that there was or is any addition to income by or because of any increase in capital gain and in determining that there was any increase in capital gain in any sum or amount whatsoever.

(XXII) The Commissioner erred in determining that the net income of the trust was or is \$43,-807.03 or any other sum or amount whatsoever in excess of \$37,357.53.

(XXIII) The Commissioner erred in determining that 5/7ths or \$31,290.73 or any portion or amount of the net income of said trust was or is taxable to the petitioner.

(XXII) The Commissioner erred in determining (see Computation of Tax Taxable Year Ended December 31, 1936, in [9] said notice of deficiency) that there was or is net income adjusted or otherwise in the sum of \$91,806.12 or any other sum or amount whatsoever in excess of \$52,534.14 or a balance (surtax net income) in the sum of \$88,906.12 or any other sum or amount whatsoever in excess of \$49,634.14 or net income subject to normal tax in the sum of \$88,606.12 or any other sum or amount whatsoever in excess of \$49,334.14.

(XXV) The Commissioner erred in determining (see said Computation of Tax in said notice of deficiency) that there was or is a normal tax at 4% on \$88,606.12 or on any sum or amount whatsoever in excess of \$49,334.14, or a normal tax of \$3,544.24 or any other sum or amount whatsoever in excess of \$1,993.37, or that there was or is surtax on the sum of \$88,906.12 or on any other sum or amount whatsoever in excess of \$49,634.14, or surtax in the amount of \$23,942.12 or any other sum or amount whatsoever in excess of \$7,601.22, or that the correct or any income tax liability of the petitioner on or with respect to his income for

the calendar year 1936 was or is \$27,486.36 or any sum or amount whatsoever in excess of \$9,574.59, or that there is any deficiency of income tax in the amount of \$17,835.82 or any other sum or amount whatsoever.

(XXVI) The Commissioner erred in determining (see Adjustments to Net Income Taxable Year Ended December 31, 1937, in said notice of deficiency) that there was or is additional income and unallowable deduction or additional [10] income or unallowable deduction in the sum of \$28,605.02 or any other sum or amount whatsoever, or that there was or is income from trust taxable to petitioner in the sum of \$23,623.27 or any other sum or amount whatsoever, or that there was or is capital gain of \$4,514.65 or any other sum or amount whatsoever by way of additional income, or that financial expense in the sum of \$467.10 or any other sum or amount whatsoever should be disallowed, or that there was or is total net income of \$81,404.49 or a total net income adjusted of \$81,159.49 or total net income or total net income adjusted of or in any other sum or amount whatsoever in excess of \$52,554.47.

(XXVII) The Commissioner erred in determining (see Explanation of Adjustments for taxable year ended December 31, 1937, in said notice of deficiency) that \$23,623.27 is taxable to the petitioner as income of said Gaylord Trust and in determining that any income of said Gaylord Trust is taxable to the petitioner.

(XXVIII) The Commissioner erred in deter-

mining (see said Explanation of Adjustments in said notice of deficiency) that there was or is addition to income of said trust by increase in capital gain in the sum of \$2,576.80, or by any increase in any capital gain or in any sum or amount whatsoever, and that the net income of trust as adjusted or otherwise was or is \$33,072.58 or any sum or amount whatsoever in excess of \$30,498.78.

(XXIX) The Commissioner erred in determining that [11] 5/7ths or any part of the net income of said trust was or is taxable to the petitioner or that the sum of \$23,623.27 or any other sum or amount whatsoever of the net income of said trust as adjusted or of any net income of said trust or of any income of said trust was or is taxable to the petitioner.

(XXX) The Commissioner erred in determining or holding that the deduction of \$517.10 claimed in the petitioner's return for attorney's fees should be disallowed as to \$467.10 or in any other sum or amount whatsoever or that the sum of \$467.10 referred to in said notice of deficiency was or is not an expense incurred in carrying on a trade or business within the meaning of Section 23a of the Revenue Act of 1936 or that such amount is not an allowable deduction.

(XXXI) The Commissioner erred in determining (see Computation of Tax Taxable Year Ended December 31, 1937, in said notice of deficiency) that the petitioner's net income for or with respect to the calendar year 1937 as adjusted or otherwise was or is \$81,159.49 or any other sum or amount

whatsoever in excess of \$52,554.47 or that the balance (surtax net income) was or is \$78,259.49 or any other sum or amount whatsoever in excess of \$49,654.47 or that the net income subject to normal tax was or is \$77,959.49 or any other sum or amount whatsoever in excess of \$49,354.47.

(XXXII) The Commissioner erred in determining (see said Computation of Tax in said notice of deficiency) that petitioner was or is liable for normal tax at 4% on \$77,959.49 or any other sum or amount whatsoever in excess of \$49,354.47 [12] or that the petitioner was or is liable for normal tax in the amount of \$3,118.38 or any other sum or amount whatsoever in excess of \$1,974.18 or that the petitioner is liable for surtax on \$78,259.49 or on any other sum or amount whatsoever in excess of \$49,654.47 or that there was or is surtax in the amount of \$18,581.96 or any other sum or amount whatsoever in excess of \$7,525.71 or that the total tax is \$21,700.34 or any other sum or amount whatsoever in excess of \$9,499.89 or that the correct income tax liability was or is \$21,690.34 or any other sum or amount whatsoever in excess of \$9,489.89 or that there is deficiency of income tax in the amount of \$12,033.50 or any other sum or amount whatsoever or that there is any deficiency in any amount whatsoever for or with respect to any tax on any income of the petitioner for, in or with respect to the year 1937.

(XXXIII) The Commissioner erred in determining (see Adjustments to Net Income Taxable

Year Ended December 31, 1938, in said notice of deficiency) that there was or is additional income and unallowable deductions or additional income or any unallowable deduction or deductions in the total sum of \$32,510.65 or any other sum or amount whatsoever in excess of \$491.82 and in determining that there was or is income from trust taxable to petitioner in the sum of \$18,074.66 or any other sum or amount whatsoever or any income from any trust taxable to the petitioner and in determining that there was or is any long-term capital gain in the sum of \$8,868.06 or any other sum or amount whatsoever taxable as additional [13] income to the petitioner and in determining that loss in the amount of \$5,076.11 or any part thereof should be disallowed.

(XXXIV) The Commissioner erred in determining that there was or is net income adjusted or otherwise in the amount of \$75,146.75 or any other sum or amount in excess of \$43,127.92.

(XXXV) The Commissioner erred in determining (see Explanation of Adjustments for Taxable Year Ended December 31, 1938, in said notice of deficiency) that \$18,074.66 or any part thereof or any other sum or amount whatsoever is taxable to the petitioner as income of said Gaylord Trust and in determining that any income of said Gaylord Trust in or for the calendar year 1938 is taxable to the petitioner, and in determining that the deduction of \$15,899.86 for amount distributable to beneficiaries or any part of said sum or amount

should be disallowed, and in determining that there was or is increase in long-term capital gain in the sum of \$2,687.29 or any increase in any capital gain in any sum or amount whatsoever, and in determining that the loss of \$5,076.11 claimed by the petitioner or any part thereof should be disallowed, and in determining that the net income of trust as adjusted was or is \$25,304.53 or any other sum or amount whatsoever in excess of \$1,641.27.

(XXXVI) The Commissioner erred in determining that the petitioner was liable for 5/7ths or any proportion or part whatsoever of the income of said Gaylord Trust for, [14] in or with respect to the calendar year 1938 or that 5/7ths or any proportion whatsoever of the income of said trust was or is the portion of the petitioner or that the petitioner was or is liable for \$18,074.66 net income of said trust or any part thereof or any income from said trust.

(XXXVII) The Commissioner erred in determining or holding (see said Explanation of Adjustments in said notice of deficiency) that no deductible loss was sustained by reason of the demolition of the building in Santa Monica, California, referred to in the return of income of said trust for the calendar year 1938 and referred to in said notice of deficiency and that no deductible loss in the sum of \$5,076.11 was sustained by petitioner by reason of the demolition of said building in said year.

(XXXVIII) The Commissioner erred in determining (see said Explanation of Adjustments

in said notice of deficiency) that the amount of \$5,076.11 deducted in the petitioner's return of his income for the calendar year 1938 as representing his proportionate share of loss sustained in that year by reason of the voluntary demolition of a building in Santa Monica, California, should be disallowed.

(XXXIX) The Commissioner erred in determining (see Computation of Tax Taxable Year Ended December 31, 1938, in said notice of deficiency) that there was or is net income adjusted or otherwise in the sum of \$75,146.75 or any other sum or amount whatsoever in excess of \$43,127.92, or that there was or is a balance (surtax net income) in the sum [15] of \$72,646.75 or any sum or amount whatsoever in excess of \$40,227.92, or that there was or is net income subject to normal tax in the sum of \$72,346.75 or any other sum or amount whatsoever in excess of \$39,927.92.

(XL) The Commissioner erred in determining (see said Computation of Tax in said notice of deficiency) that there was or is normal tax at 4% on \$72,346.75 or on any other sum or amount whatsoever in excess of \$39,927.92 or normal tax in the sum of \$2,893.87 or any other sum or amount whatsoever in excess of \$1,597.12, or that there was or is surtax on \$72,646.75 or on any other sum or amount whatsoever in excess of \$40,227.92 or surtax in the amount of \$15,998.10 or any other sum or amount whatsoever in excess of \$5,174.70 or total tax under Sections 11 or 12 or either thereof in

the sum of \$18,891.97 or any other sum or amount whatsoever in excess of \$6,771.82.

(XLI) The Commissioner erred in determining (see said Computation of Tax in said notice of deficiency) that under alternative tax Section 117 (e) (1) Revenue Act of 1938 there was or is net income adjusted or otherwise in the amount of \$75,146.75 or any other sum or amount whatsoever in excess of \$43,127.92, or that there was or is net long-term capital gain in the amount of \$45,-599.54 or any other sum or amount whatsoever in excess of \$36,731.86 or that there was or is ordinary net income in the amount of \$29,547.21 or any other sum or amount whatsoever in [16] excess of \$6,396.06 or that there was or is balance (surtax net income) in the sum of \$27,047.21 or any other sum or amount whatsoever in excess of \$3,896.06, or that there was or is net income subject to normal tax in the sum of \$26,747.21 or any other sum or amount whatsoever in excess of \$3,596.06 or that there was or is normal tax at 4% on \$26,747.21 or on any other sum or amount whatsoever in excess of \$3,596.06 or normal tax in the sum of \$1,069.89 or any other sum or amount whatsoever in excess of \$143.84, or that there was or is surtax on \$27,047.21 or on any other sum or amount whatsoever or surtax in the amount of \$2,438.97 or any other sum or amount whatsoever, or that there was or is partial tax in the sum of \$3,508.86 or any other sum or amount whatsoever in excess of \$143.84 or that 30% of net long-term capital gain was or is \$13,679.86 or any sum or

amount whatsoever in excess of \$11,019.44 or that alternative tax or correct income tax liability was or is \$17,188.72 or any other sum or amount whatsoever in excess of \$6,746.10.

(XLII) The Commissioner erred in determining (see said Computation of Tax in said notice of deficiency) that there was or is deficiency of income tax in the sum of \$10,442.62 or any other sum or amount whatsoever on or with respect to the income of the petitioner for the calendar year 1938.

(XLIII) The Commissioner erred in determining (see Adjustments to Net Income Taxable Year Ended December 31, 1939, in said notice of deficiency) that there was or [17] is additional income and unallowable deductions or additional income or any unallowable deductions or deduction in the sum of \$29,783.52 or any sum or amount whatsoever in excess of \$1,016.69, or that there was or is income from trust taxable to the petitioner of \$18,002.94 or any other sum or amount whatsoever or any income from any trust whatsoever taxable to the petitioner or that there was or is long-term capital gain of \$5,907.89 or any other sum or amount whatsoever, or that farm loss of \$3,456.00 or any part thereof should be disallowed, or that storm loss of \$1,400.00 or any part thereof should be disallowed, or that there was or is net income adjusted or otherwise of \$70,922.89 or any other sum or amount whatsoever in excess of \$42,156.06.

(XLIV) The Commissioner erred in determining (see Explanation of Adjustments for taxable year ended December 31, 1939, in said notice of deficiency) that \$18,002.94 of the income of said Gaylord Trust or any part of said sum or of any income of said trust was or is taxable to the petitioner, and in determining that deduction of \$22,-465.39 for amount distributable to beneficiaries or any part of said sum should be disallowed, and in determining that there was or is increase in long-term capital gain in amount of \$1,074.92 or any other sum or amount whatsoever or any increase in any long-term capital gain whatsoever, and in determining that the net income of trust as adjusted was or is the sum of \$25,204.12 or any other sum or amount what- [18] soever in excess of \$1,663.81.

(XLV) The Commissioner erred in determining (see said Explanation Of Adjustments in said notice of deficiency) that 5/7ths or any part or portion of the net or any income of said Gaylord Trust was or is taxable to the petitioner and in determining that \$18,002.94 or any part thereof was or is taxable to the petitioner.

(XLVI) The Commissioner erred in determining (see said Explanation Of Adjustments in said notice of deficiency) that a deduction of \$4,320.00 which was taken by the petitioner for loss sustained in the taxable year 1939 by reason of 432 pear trees valued at \$10.00 each having been voluntarily pulled in 1939 to make room for more profitable crops and

livestock should be disallowed or that any part of said sum claimed by the petitioner as a deduction should be disallowed and in determining that loss in the amount of \$864.00 only should be allowed and that said sum of \$4,320.00 was or is not a deductible loss.

(XLVII) The Commissioner erred in determining (see said Explanation Of Adjustments in said notice of deficiency) that the deduction of \$2,650.00 taken and claimed by the petitioner in his return as representing his one-half of a loss of \$5,300.00 which resulted from destruction by storm of ornamental trees on residence property owned by the petitioner and his wife Gertrude H. Gaylord should be disallowed and in allowing only \$1,250.00 of said deduction of \$2,650.00 so taken and claimed by the petitioner. [19]

(XLVIII) The Commissioner erred in determining (see Computation Of Tax Taxable Year Ended December 31, 1939, in said notice of deficiency) that net income adjusted or otherwise was or is \$70,922.89 or any other sum or amount whatsoever in excess of \$42,156.06, and in determining that there was or is balance (surtax net income) of \$68,422.89 or any other sum or amount whatsoever in excess of \$39,656.06, and in determining that net income subject to normal tax was or is \$68,122.89 or any other sum or amount whatsoever in excess of \$39,356.06.

(XLIX) The Commissioner erred in determining (see said Computation Of Tax in said notice of deficiency) that there was or is normal tax at

4% on \$68,122.89 or on any other sum or amount whatsoever in excess of \$39,356.06 or that there was or is normal tax of \$2,724.92 or any other sum or amount whatsoever in excess of \$1,574.24 or that there was or is surtax on \$68,422.89 or on any other sum or amount whatsoever in excess of \$39,656.06 or that there was or is surtax of \$14,181.84 or surtax in any other sum or amount whatsoever in excess of \$5,037.45 or that there was or is total tax under Sections 11 and 12 or either thereof in the sum of \$16,906.76 or any other sum or amount whatsoever in excess of \$6,611.69.

(L) The Commissioner erred in determining (see said Computation Of Tax in said notice of deficiency) that under alternative tax, Section 117 (c) (1) I.R.C. there was or is net income adjusted or otherwise of \$70,922.89 or any [20] other sum or amount in excess of \$42,156.06, and in determining that there was or is net long-term capital gain of \$35,602.44 or any other sum or amount whatsoever in excess of \$29,694.55, and in determining that there was or is ordinary income in the sum of \$35,-320.45 or any other sum or amount whatsoever in excess of \$12,461.51, and in determining that there was or is balance (surtax net income) of \$32,820.45 or any other sum or amount whatsoever in excess of \$9,961.51, and in determining that there was or is net income subject to normal tax of \$32,520.45 or any other sum or amount whatsoever in excess of \$9,661.51.

(LI) The Commissioner erred in determining (see said Computation Of Tax in said notice of de-

ficiency) under said alternative tax that there was or is normal tax at 4% on \$32,520.45 or on any sum or amount whatsoever in excess of \$9,661.51 or that there was or is normal tax at 4% in the amount of \$1,300.82 or any other sum or amount whatsoever in excess of \$386.46 or that there was or is surtax on \$32,820.45 or on any other sum or amount whatsoever in excess of \$9,961.51 or that there was or is surtax in the amount of \$3,552.29 or any other sum or amount whatsoever in excess of \$297.69 or that there was or is partial tax of \$4,853.11 or any other sum or amount whatsoever in excess of \$684.15 or that 30% of net long-term capital gain was or is \$10,680.73 or any other sum or amount whatsoever in excess of \$8,908.37 or that there was or is alternative tax or correct income tax liability of \$15,533.84 or any other sum or amount [21] whatsoever in excess of \$9,592.52.

(LII) The Commissioner erred in determining (see said Computation Of Tax in said notice of deficiency) that there was or is deficiency of income tax of \$9,206.82 or any sum or amount whatsoever, and in determining that there was any deficiency of income tax of any amount for, on or with respect to the income of the petitioner in or for the calendar year 1939.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The trust mentioned and referred to in said notice of deficiency and which is sometimes described in said notice as the Gaylord Trust was and is a trust originally created and provided for

in that certain declaration of trust dated the 7th day of November, 1935, wherein the petitioner George S. Gaylord and his said wife Gertrude H. Gaylord are named and referred to as trustees, which said declaration of trust was recorded September 28, 1937, in the office of the County Recorder of Los Angeles County, California, in Book 15288 at Page 94 of Official Records of said County. Said declaration of trust was also filed for record in the office of the Clerk of the County Court, Cameron County, Texas, on the 29th day of January, 1938, and recorded February 1, 1938, in Deed Record of said county, Volume 277 on pages 593-9, and was also filed for record in the office of the Clerk, County Court, Hidalgo County, Texas, March 18, 1938, [22] and recorded March 24, 1938, in Volume X, pages 594-600, of the Miscellaneous Records of said county, and was also filed for record in the office of the County Clerk, Potter County, Texas, June 22, 1938, and recorded June 23, 1938, in Deed Records of said county in Volume 282 on page 106, and was also filed for record in the office of the County Clerk, Jim Wells County, Texas, December 16, 1938, and recorded December 29, 1938, in Deed Records of said county in Volume 64 on pages 348-355. Attached hereto, marked Exhibit B, and hereby referred to and made a part hereof is a full and true copy of said declaration of trust and reference is hereby made to said declaration of trust for all particulars thereof and of the trust therein provided for. Said trust and declaration thereof are and

have always been absolutely irrevocable and unchangeable by said George S. Gaylord and Gertrude H. Gaylord or by either of them or by any other person or party whomsoever, and there is not and has never been any power of revocation, change or modification of said trust or of any provision thereof reserved in any manner either in said declaration of trust or otherwise to said George S. Gaylord and Gertrude H. Gaylord or either of them or to any other person or party whomsoever. In connection with the creation of said trust and as a part of the same transaction the petitioner George S. Gaylord made and personally signed and executed under his oath a gift tax return for the calendar year 1935, on Form 709 Treasury [23] Department Internal Revenue Service, which said return was so verified by him under date of February 3, 1936, before Alice F. Jackson, a notary public in and for the County of Los Angeles, State of California, and filed in the office of the United States Collector of Internal Revenue at Los Angeles, California, on March 10, 1936. Said return included and covered the petitioner George S. Gaylord's contribution to said trust of the 5000 shares of the common capital stock of Marathon Paper Mills Company mentioned in said declaration of trust. In said return the petitioner declared that the gift represented by said contribution was made "By the creation of an irrevocable trust for the benefit of another" and there was at the same time filed in said office with said return and as a part thereof a copy of said declaration of trust. The petitioner upon so filing his said

return with said copy of said declaration of trust, with said Collector of Internal Revenue, and at the same time the return was so filed, paid a gift tax in the amount of \$2,531.27 on gifts referred to in said return and which included the petitioner's gift of said 5000 shares to said trust. Thereafter and under date of December 28, 1936, the petitioner paid to said Collector an additional gift tax of \$90.-05 assessed on said return. Attached hereto, marked Exhibit D, and hereby referred to and made a part hereof is a copy of said gift tax return. Similarly in connection with the creation of said trust and as a part of the same transaction said [24] Gertrude H. Gaylord made and personally signed and executed under her oath a gift tax return for the calendar year 1935 on Form 709 Treasury Department Internal Revenue Service, which said return was so verified by her under date of September 3, 1936, before Alice F. Jackson, a notary public in and for the County of Los Angeles, State of California, and filed in the office of said Collector on March 10, 1936. Said return included and covered said Gertrude H. Gaylord's contribution to said trust of 2000 shares of the common capital stock of Marathon Paper Mills Company mentioned in said declaration of trust. In said return said Gertrude H. Gaylord similarly declared that the gift represented by said contribution was made "By the creation of an irrevocable trust for the benefit of another", and there was at the same time filed in said office with said return and as a part thereof a copy of said declaration of trust. Attached hereto,

marked Exhibit E, and hereby referred to and made a part hereof is a copy of said gift tax return of said Gertrude H. Gaylord. The only trust to which said gift tax returns could or did refer was said trust so originally created by the hereinbefore mentioned declaration of trust. Long before any question, issue or controversy was raised by any tax authority respecting said trust the petitioner George S. Gaylord and said Gertrude H. Gaylord, his wife, upon advice of counsel and out of an abundance of caution, signed and executed a certain Declaration Being A Part Of A Certain [25] Declaration Of Trust Dated November 7, 1935, which was dated November 7, 1935, and was acknowledged and sworn to by said George S. Gaylord and Gertrude H. Gaylord under date of March 27, 1940, before J. C. Humphreys, a notary public in and for the County of Los Angeles in the State of California. Said Declaration Being A Part Of A Certain Declaration Of Trust Dated November 7, 1935, was recorded in the office of the County Recorder of Los Angeles County, California, on March 28, 1940, in Book 17245 at Page 350 of Official Records of said county. Attached hereto, marked Exhibit C, and hereby referred to and made a part hereof is a full and true copy of said Declaration Being A Part Of A Certain Declaration Of Trust Dated November 7, 1935. Said trust was created under and pursuant to a mutual understanding and agreement had between said George S. Gaylord and Gertrude H. Gaylord, his wife, prior to the execution of the

above mentioned declaration of trust dated the 7th day of November, 1935, in and by which understanding and agreement it was understood and agreed by and between said George S. Gaylord and Gertrude H. Gaylord that if said George S. Gaylord would contribute to an irrevocable trust to be created and provided for the uses and purposes and upon the terms and conditions set forth in said declaration of trust said 5000 shares of the capital stock of Marathon Paper Mills Company owned by him as his separate property, such shares to be a part of the trust estate to be provided for in said trust, said [26] Gertrude H. Gaylord would contribute to such trust as a part of such trust estate in trust for the same uses and purposes and upon the same terms and conditions the above mentioned 2000 shares of the common capital stock of Marathon Paper Mills Company owned by her as her separate property and that if she would make such contribution of said 2000 shares so owned by her said George S. Gaylord would make such contribution of said 5000 shares so owned by him and that said trust was to be absolutely and at all times and under all circumstances irrevocable by any person or party whomsoever or whatsoever. Under and pursuant to said mutual understanding and agreement between said George S. Gaylord and Gertrude H. Gaylord said declaration of trust was executed by them and he contributed to said trust said 5000 shares and she contributed to said trust said 2000 shares. There was a good and valuable consideration passing from her to him for his execution of

said declaration of trust and his contribution of said stock to said trust and his joining in said trust. There was likewise a good and valuable consideration passing from him to her for her execution of said declaration of trust and her contribution of her said stock to said trust and her joining in said trust. Said trust was not created without a valuable consideration passing to each of the trustors therein named. At the time said George S. Gaylord and Gertrude H. Gaylord executed said declaration of trust and at all times during the years 1936, 1937, 1938 [27] and 1939 they had no knowledge of any law which would make or render or purported to make or render said trust in any manner or at any time revocable or the income thereof or any part thereof taxable to the trustors or either of them. At the time of the execution in the year 1935 of said declaration of trust and prior thereto and at all times since said execution of said declaration of trust it has always been the unaltered and firm mutual desire, understanding, agreement, assumption and belief of said trustors and trustees George S. Gaylord and Gertrude H. Gaylord that said trust was and is absolutely irrevocable by them or by either of them or by any person or party whomsoever or whatsoever at any time or in any manner whatsoever. At all times since said execution in 1935 of said declaration of trust said George S. Gaylord and Gertrude H. Gaylord have acted on said agreement, understanding, assumption and belief that said trust was so absolutely irrevocable. No question has ever been raised nor can legiti-

mately be raised now as to the ever unchanged and firm intent at all times of said George S. Gaylord and Gertrude H. Gaylord to create pursuant to their mutual understanding and agreement an irrevocable trust on the terms, conditions and provisions set forth in said declaration of trust. The intent of said George S. Gaylord and Gertrude H. Gaylord that the trust created and provided for in said declaration of trust should forever be irrevocable preceeded the creation of said trust. was present when said trust was [28] formed and has at all times remained the same and unchanged.

(b) None of the income of or from the trust hereinbefore mentioned and referred to, either for any of the years 1936, 1937, 1938 or 1939, or otherwise, is or ever has been income of the peitioner George S. Gaylord or said Gertrude H. Gaylord, his wife, in his or her individual or personal capacity, or income in which he or she has or ever had any beneficial right, title, interest or estate whatsoever. The whole of the net income of and from said trust in or for said years 1936, 1937, 1938 and 1939 was the property of and belonged to and was taxable to Margaret Gaylord Ruppel and Gertrude Gaylord Bruce, the first named beneficiaries in and under said trust, in equal shares. There is no law or lawful or valid regulation whatsoever under or pursuant to which any of the aforementioned income can be considered or treated as income of the petitioner George S. Gaylord and said Gertrude H. Gaylord, his wife, or either of them, in their respective per-

sonal or individual capacities, or under or pursuant to which they are or either of them is or they or either of them can be made liable or charged for or assessed with any income tax on any of said income. Under the law all of said income for income tax purposes belongs to and is chargeable to the two first named beneficiaries of said trust, the above named Margaret Gaylord Ruppel and Gertrude Gaylord Bruce, in equal shares, and not to the petitioner said George S. Gaylord and said Gertrude H. [29] Gaylord, his wife, or to either of them. There is no provision for any accumulation of any of the income of said trust but all of the income of said trust must be paid, distributed or applied to or for the beneficiaries of said trust, either monthly, quarterly or semi-annually, but in any event annually. Neither said George S. Gaylord nor his wife Gertrude H. Gaylord can at any time use or enjoy or be entitled to any of said income or participate therein.

(c) Said two first named beneficiaries of said trust, Margaret Gaylord Ruppel and Gertrude Gaylord Bruce (named in said declaration of trust as Gertrude Gaylord), are the daughters of the petitioner George S. Gaylord and said Gertrude H. Gaylord, his wife. Said Margaret Gaylord Ruppel was born on November 10, 1904, and said Gertrude Gaylord Bruce was born May 31, 1916. Each of said beneficiaries has lawful issue now living. Said Margaret Gaylord Ruppel has two children now living, to-wit, a daughter Barbara Brunker, who is over the age of sixteen (16) years, she having been

born October 14, 1925, and a son Robert Henry Brunker, who is over the age of thirteen (13) years, he having been born June 3, 1928. Said Gertrude Gaylord Bruce has one child living, to-wit, a daughter Ann Bruce, who is over the age of three (3) years, she having been born April 20, 1938. Said Margaret Gaylord Ruppel and Gertrude Gaylord Bruce now have and have had at all times since the inception of said trust in 1935 and each of them [30] now has and at all said times has had present existing and equal beneficial interests in said trust and the estate thereof and are the full owners of said trust, subject only in the event of non-survival to May 31, 1946 (when said Gertrude Gaylord Bruce will attain the age of thiry (30) years and the trust then in any case terminate) to being divested in favor of issue. Said Barbara Brunker, Robert Henry Brunker and Ann Bruce are such issue now living.

(d) Under said declaration of trust there is neither reserved to said George S. Gaylord nor has he ever had thereunder nor does he now have any beneficial right, title, interest or estate whatsoever in, to or with respect to any of the principal or corpus of the estate of said trust.

(e) Each of said beneficiaries of said trust Margaret Gaylord Ruppel and Gertrude Gaylord Bruce rendered and filed with said Collector of Internal Revenue, at Los Angeles, California, her individual income tax returns of her income for said years 1936, 1937, 1938 and 1939, respectively, in which returns she included all of her one-half of the

net income of said trust for the appropriate year, and paid her individual income taxes on said income.

(f) Said declaration of trust shows on its face that it was intended to be operative under laws of jurisdictions other than California. Upon information and belief the petitioner alleges that under the law of every jurisdiction in the United States outside of the State of California the trust set forth in said declaration of trust [31] in the form in which the same is set forth was at all times since the inception of said trust and is absolutely irrevocable. Said trust is also irrevocable under the laws of the State of California.

(g) During the year 1938 the trustees of said trust invested over \$94,000.00 of the principal or corpus of said trust in, and by way of purchase of, certain real property in the State of Texas for said trust and as a part of the estate thereof, which said real property ever since has been and is now owned and held by said George S. Gaylord and Gertrude H. Gaylord as trustees of said trust for the benefit of said trust and the beneficiaries thereof. In connection with such investments and purchases and the operations of said trustees on behalf of said trust in the State of Texas said declaration of trust was recorded in the year 1938 in the offices of the clerks of the county courts of Cameron, Hidalgo, Potter and Jim Wells Counties, Texas, respectively, as hereinbefore set forth. Included in the net income of and from said trust for the years 1938 and 1939 referred to in said notice of deficiency were

and are the following net rents from said real property in said State of Texas, to-wit: In and for said year 1938 \$3,859.95 and in and for said year 1939 \$6,370.67. Upon information and belief the petitioner alleges that under the law of Texas said trust always was and is irrevocable and all of said income was and is wholly the property of said beneficiaries Margaret Gaylord Ruppel and Gertrude [32] Gaylord Bruce, in equal shares, and that neither the petitioner nor his wife Gertrude Gaylord is entitled to have or enjoy any of said income.

(h) All of the 7000 shares of the capital stock of Marathon Paper Mills Company, a Wisconsin corporation, mentioned in said declaration of trust were sold and delivered by said trustees in Chicago, Illinois, and/or in the State of New York. Upon information and belief the petitioner alleges that said trust always was and is irrevocable in the States of Illinois and New York.

(i) All of the cash funds of said trust in the years 1936, 1937 and 1938 were kept on deposit in the names of said George S. Gaylord and Gertrude H. Gaylord, as trustees under Declaration of Trust dated November 7, 1935, with Harris Trust and Savings Bank in Chicago, Illinois, and in the years 1939, 1940 and 1941 all of the bank accounts of said trustees, as trustees of said trust, were kept with said Harris Trust and Savings Bank in Chicago, Illinois, and with Bankers Trust Company, of 16 Wall Street in the City of New York, in the State of New York.

(j) Said 7000 shares of the capital stock of Marathon Paper Mills Company were acquired with some bonds in a non-taxable exchange October 31, 1927, in which exchange the petitioner George S. Gaylord exchanged 3357 shares of the stock of Menasha Printing and Carton Company (a corporation merged or consolidated with Marathon Paper Mills [33] Company (a corporation merged or consolidated with Marathon Paper Mills Company October 31, 1927) for 6728 shares of common stock and \$1,038,000.00 (face value) in bonds of Marathon Paper Mills Company. In determining the basis for said 3357 shares of Menasha Printing and Carton Company stock used as the basis for the stock and bonds so acquired in Marathon Paper Mills Company the Commissioner erred by disregarding two important transactions, hereinafter mentioned, affecting the basis of this stock. Commencing in 1928 the petitioner George S. Gaylord sold some of such bonds so acquired, using a basis of \$251.99 for each bond in reporting such sales transactions in his subsequent returns of income for each of the years in which such sales were made, that is, 1928, 1929, 1930, 1931, 1932, 1933, 1934 and 1935. This basis was accepted by the Internal Revenue Service upon the examination of the petitioner's income tax return of his income for the year 1928, in which year the first sales of such bonds were made by him, and said basis was used thereafter by him in all the aforementioned subsequent returns in reporting sales of such bonds. The basis for the stock so acquired with such bonds was also determined and

shown in the computation of the basis for such bonds and has been used by the petitioner in all income tax returns reporting sales of that stock, that is, in all income tax returns of income for the years 1935 to 1939, inclusive, the last of such stock having been sold in the last mentioned year, that is, in 1939. Attached hereto, marked Exhibit F, and hereby referred to and made a part hereof is a copy (substantially) of the schedule which was attached to all of said income tax returns and used in connection therewith and referred to therein in which the aforesaid bases were set forth. These bases so used by the petitioner in all income tax returns made by him and also the bases determined by the Internal Revenue Service for the Marathon Paper Mills Company stock are in error, principally for the reason that two important taxable exchanges were not considered by either the petitioner or the Internal Revenue Service in arriving at the bases of value of such stocks and bonds, the petitioner having failed to consider said two exchanges through inadvertence. These two exchanges are as follows:

(1) On or about July 1, 1917, in the merger or consolidation of Menasha Carton Company and Menasha Printing Company to form Menasha Printing and Carton Company, the petitioner George S. Gaylord surrendered 337 shares of stock owned by him in Menasha Carton Company and gave his note for \$152,161.11 for 435 shares of the common stock and 190 shares of the preferred stock of the new corporation, Menasha Printing and Carton Com-

pany. Upon completion of this consolidation or merger he did not own an interest in the new company proportionate to his interest in the merged or consolidated company prior to such merger or consolidation. The basis upon which the exchange of stock in the old [35] corporations for stock in the new corporation was made was upon the actual value of the assets of each of the old companies at the time of the merger or consolidation. The par or stated value of the stock in the new corporation was based substantially upon the par or stated value of the stock of the old companies plus the accumulated earnings to the date of the consolidation or merger.

(2) On or about August 24, 1927, the petitioner George S. Gaylord acquired 352 shares of Menasha Printing and Carton Company from his brother C. W. Gaylord in exchange for 432 shares of stock of Robert Gaylord, Inc. The petitioner previously had given to his brother C. W. Gaylord on or about October 5, 1925, 350 shares of stock of Menasha Printing and Carton Company in exchange for the same 432 shares of stock in Robert Gaylord, Inc., so returned to C. W. Gaylord on or about August 24, 1927. These exchanges were taxable, although through inadvertence not considered so by the petitioner at the times involved, and the basis for the 352 shares of stock acquired by him affects the basis of the Marathon Paper Mills Company stock and its value is determined by the value placed on stock of Menasha Printing and Carton Company, a party to the tax-free organization completed in October,

1927. This value is determined as follows: The petitioner George S. Gaylord received for 3357 shares of Menasha Printing and Carton Company stock, which included the 352 shares received on or about August 24, 1927, from his brother, the following securities: [36]

1038 5½% bonds	\$ 1,038,000.00
6728 shares common stock valued at	
130.30 per share	876,658.40

	\$ 1,914,658.40

337/3357 of this value \$1,914,658.40 is \$200,762.51, the value of these 352 shares of stock.

Attached hereto, marked Exhibit G, and hereby referred to and made a part hereof is a copy (substantially) of a memorandum which was submitted to the Internal Revenue Service showing the basis of the stock acquired by the petitioner in Menasha Printing and Carton Company, based on the earnings in 1917 of the Menasha Carton Company. Attached hereto, marked Exhibit H, and hereby referred to and made a part hereof, is a schedule showing the computation of the basis of Marathon Paper Mills stock based upon the data set forth in the hereinbefore referred to Exhibit F and Exhibit G.

(k) For the purpose of computing the capital gain realized in the years 1936, 1937, 1938 and 1939 from the sale of shares of the common capital stock of Marathon Paper Mills Company belonging to said trust the statutory basis for computing gain or loss on each such sale was and is \$8.21 per share as

stated in the income tax returns filed for said year as not \$2.83542 per share or any sum or amount less than \$8.21 per share.

(I) In March, 1938, the petitioner George S. Gaylord, in his individual and personal capacity, and his said wife Gertrude H. Gaylord, in her individual and per- [37] sonal capacity, and the hereinbefore mentioned trust by its trustees George S. Gaylord and Gertrude H. Gaylord purchased each an undivided one-third interest in business property situate in Santa Monica, California, consisting of land improved at the time of said purchase with a storerooms building then occupied by three different tenants in several tenancies. In the latter part of 1938 one of these tenants, requiring additional space, requested the owners to build an addition to the building and to do such remodeling as was necessary to meet his requirements. A contractor was engaged to give an estimate on the cost of such work and it was found that considerable expenditure would have to be made to remodel the old building and the contractor suggested demolishing the old building and erecting a new building and gave said owners his estimates for this work. The latter then consulted brokers through whom the property was purchased and were informed as to the rental value of the proposed improvement and as to the prospect of obtaining new tenants if the then tenants could not be retained. It was at this time, in 1938, that the petitioner and his co-owners decided to demolish the building. At the time the premises above mentioned were acquired by the

petitioner and his co-owners they had no intention of demolishing the building then on said land.

(m) The petitioner George S. Gaylord acquired a ranch near Carmel, California, part of which was then devoted to a pear orchard containing approximately 432 trees. After [38] several years of operation prices received for the fruit declined to such an extent that this operation was no longer profitable and in 1939 he removed the trees to use the land for other purposes. The loss claimed by him was estimated at \$10.00 per tree, which was and is the actual loss sustained by him and which loss is substantiated by the fact that similar lands in the vicinity with pear trees have been sold within a comparable time of such removal for \$1,500.00 per acre with an average of 75 trees to the acre, while similar lands in such vicinity without such trees sold for \$750.00 per acre.

Wherefore, the petitioner prays that this Board may hear this proceeding and redetermine the deficiency set forth by the Commissioner of Internal Revenue hereinbefore referred to and determine that there is no such deficiency of \$49,518.76 and that there is no deficiency in any sum or amount whatsoever in or with respect to the petitioner's income tax liability for the taxable years 1936 to

1939, inclusive, or any of said years, and for such other relief as may be proper in the premises.

GEORGE S. GAYLORD

Post Office Address: 639 Rosemont Avenue, Pasadena, California.

THOMAS A. J. DOCKWEILER
whose post office address is 1035 I. N. Van Nuys
Building, 210 West Seventh Street, Los Angeles, California. [39]

JAMES W. BONTEMS

whose post office address is 215 West Sixth Street,
Los Angeles, California.

Attorneys for said petitioner.

State of California,
County of Los Angeles—ss.

George S. Gaylord, being duly sworn, says that he is the petitioner above named; that he has read the foregoing petition and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that he believes those to be true.

GEORGE S. GAYLORD

Subscribed and sworn to before me this 5th day of November, 1941.

(Notarial Seal) J. F. KINMAN
Notary Public in and for said County of Los Angeles, State of California.

My commission expires August 14, 1942. [40]

EXHIBIT A

Form 1230

SN-IT-1

Treasury Department
Internal Revenue Service

12th Floor

U. S. Post Office and Court House,
Los Angeles, California

Sep 17, 1941

Office of
Internal Revenue Agent in Charge
Los Angeles Division
LA: IT:90D: PBMr. George S. Gaylord,
639 Rosemont Avenue,
Pasadena, California.

Sir:

You are advised that the determination of your income tax liability for the taxable year(s) 1936 to 1939, inclusive, discloses a deficiency of \$49,-518.76 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are [41] requested to execute the enclosed form and for-

Exhibit A—(Continued)

ward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA: Conf. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,
GUY T. HELVERING,
Commissioner,
By GEORGE D. MARTIN
Internal Revenue Agent in
Charge.

Enclosures:

Statement.

Form of waiver. [42]

Statement

LA :IT:90D:PB

Mr. George S. Gaylord,
639 Rosemont Avenue,
Pasadena, California.

Tax Liability for the Taxable Years Ended

December 31, 1936,

December 31, 1937,

December 31, 1938

and

December 31, 1939

Exhibit A—(Continued)

Income Tax

Year	Liability	Assessed	Deficiency
1936	\$27,486.36	\$ 9,650.54	\$17,835.82
1937	21,690.34	9,656.84	12,033.50
1938	17,188.72	6,746.10	10,442.62
1939	15,533.84	6,327.02	9,206.82
Totals	\$81,899.26	\$32,380.50	\$49,518.76

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated December 21, 1940, to your protests dated January 27 and April 21, 1941, and to the statements made at the conferences held on March 31, May 1 and July 18, 1941.

The net income as adjusted for the taxable years 1936, 1937, 1938 and 1939 of the trust created by declaration of trust executed November 7, 1935 by yourself and wife, Gertrude H. Gaylord, of which you and your wife are named as the Trustees and your two daughters, Margaret Gaylord Ruppel and [43] Gertrude Gaylord are named as beneficiaries, is held to constitute income to you and your wife as grantors under the provisions of sections 22(a), 166 and 167 of the Revenue Acts of 1936 and 1938 and of the Internal Revenue Code. Inasmuch as five-sevenths of the total value of the property transferred to the trust was contributed by you, that proportion of the net income of the trust as adjusted for each of the years 1936 to 1939, inclusive, has been included in the recomputation of your taxable net income for those years.

Exhibit A—(Continued)

For the purpose of computing the capital gains realized by you and the Gaylord Trust in the years 1936, 1937, 1938 and 1939 from the sale of shares of the common capital stock of Marathon Paper Mills Company, the statutory basis for computing gain or loss on each such sale has been determined to be \$2.83542 per share, instead of \$8.21 per share as stated in the income tax returns filed. For the purpose of that determination the fair market value of the 435 shares of common stock of Menasha Printing and Carton Company received by you on or about August 15, 1917 in exchange for stock of Menasha Carton Company is held to be \$100.00 per share. It is held further that your statutory basis for gain or loss upon the sale or other disposition of the bonds and stock of Marathon Paper Mills Company received by you on or about October 31, 1927 in exchange for 3357 shares of the common stock of Menasha [44] Printing and Carton Company is the same as your basis in the shares given in that exchange and that such basis should be apportioned 53.967% to the bonds and 46.033% to the stock received in that exchange.

A copy of this letter and statement has been mailed to your representative, Mr. James W. Bon tems, 215 West 6th Street, Los Angeles, California, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

Exhibit A—(Continued)
ADJUSTMENTS TO NET INCOME

Taxable Year Ended December 31, 1936

Net income as disclosed by return	\$52,779.14
Additional income:	
(a) Income from trust	\$31,290.73
(b) Capital gain	7,981.25
	<hr/>
Total.....	\$92,051.12
Additional deduction:	
(c) Depreciation	245.00
	<hr/>
Net income adjusted	\$91,806.12

EXPLANATION OF ADJUSTMENTS

(a) The portion of the income of the Gaylord Trust held to be taxable to you, as stated above, has been determined to be \$31,290.73, as follows:

Net income reported in trust return, form 1041.....	\$37,057.53
Addition to income:	
Increase in capital gain	6,749.50
	<hr/>
Net income of trust as adjusted.....	\$43,807.03
Your portion, 5/7	\$31,290.73
	[45]

The increase in capital gain in the amount of \$6,749.50 is due to the above noted decrease in basis of Marathon Paper Mills Company common stock from \$8.21 per share to \$2.83542 per share, resulting in a difference in realized gain, when applied to the 4,000 shares of the mentioned stock sold by the trust, of \$21,498.32, of which 30%, or \$6,449.50, is taken into account under the provisions of section 117(a) of the Revenue Act of 1936; the increase is due further to the correction of a mathe-

Exhibit A—(Continued)

matical error of \$300.00 made in the trust return in applying the 30% limitation to realized gain.

(b) This increase in the amount of capital gain reported in your return is due to the above noted decrease in basis of Marathon Paper Mills Company common stock from \$8.21 per share to \$2.83542 per share, resulting in a difference in realized gain, when applied to the 4,950 shares of the mentioned stock sold by you, of \$26,604.17, of which 30%, or \$7,981.25, is taken into account under the provisions of section 117(a) of the Revenue Act of 1936.

(c) The amount of depreciation allowable on mushroom sheds is determined to be \$875.00, representing depreciation at the rate of 8-1/3% per annum on \$10,500.00. Since you claimed depreciation on this property in the amount of \$630.00, an additional deduction of \$245.00 is allowed. [46]

COMPUTATION OF TAX

Taxable Year Ended December 31, 1936

Net income adjusted	\$91,806.12
Less: Personal exemption	\$ 2,500.00
Credit for dependent	400.00
	2,900.00
Balance (surtax net income).....	\$88,906.12
Less: Earned income credit	300.00
Net income subject to normal tax.....	\$88,606.12
Normal tax at 4% on \$88,606.12.....	\$ 3,544.24
Surtax on \$88,906.12.....	23,942.12
Correct income tax liability.....	\$27,486.36
Income tax assessed:	
Original, account No. 200178.....	9,650.54
Deficiency of income tax	\$17,835.82

Exhibit A—(Continued)
ADJUSTMENTS TO NET INCOME
Taxable Year Ended December 31, 1937

Net income as disclosed by return.....	\$52,799.47
Additional income and unallowable deduction:	
(a) Income from trust	\$23,623.27
(b) Capital gain	4,514.65
(c) Financial expense disallowed.....	467.10 28,605.02
	Total.....
	\$81,404.49
Additional deduction:	
(d) Depreciation	245.00
Net income adjusted	\$81,159.49
	[47]

Explanation of Adjustments

(a) The portion of the income of the Gaylord Trust held to be taxable to you, as stated above, has been determined to be \$23,623.27, as follows:

Net income reported in trust return, form 1041	\$30,495.78
Addition to income:	
Increase in capital gain	2,576.80
Net income of trust as adjusted.....	\$33,072.58
Your portion, 5/7	\$23,623.27

The increase in capital gain in the amount of \$2,576.80 is due to the above noted decrease in basis of Marathon Paper Mills Company common stock from \$8.21 per share to \$2.83542 per share, resulting in a difference in realized gain, when applied to the 1,600 shares of the mentioned stock sold by the trust, of \$8,599.33, of which 30%, or \$2,579.80, is taken into account under the provisions of section 117(a) of the Revenue Act of 1936, and due

Exhibit A—(Continued)

further to the correction of a mathematical error of \$3.00 made in the trust return.

(b) This increase in the amount of capital gain reported in your return is due to the above noted decrease in basis of Marathon Paper Mills Company common stock from \$8.21 per share to \$2.83542 per share, resulting in a difference in realized gain, when applied to the 2,800 shares of the mentioned stock sold by you, of \$15,048.82, of which 30%, or \$4,514.65, is taken into account under the provisions of section 117(a) of the Revenue Act of 1936. [48]

(c) The deduction of \$517.10 claimed in your return for "paid Dockweiled & Dockweiler attorneys for advise financial matters" is allowed to the extent of \$50.00 pertaining to rental property, and is disallowed as to \$467.10. The latter amount is held not to be an expense incurred in carrying on a trade or business within the meaning of section 23(a) of the Revenue Act of 1936, and such amount is not an allowable deduction.

(d) An additional deduction for depreciation is allowed in the amount of \$245.00, as explained under adjustment (c) for the preceding taxable year.

Exhibit A—(Continued)
COMPUTATION OF TAX

Taxable Year Ended December 31, 1937

Net income adjusted	\$81,159.49
Less: Personal exemption	\$ 2,500.00
Credit for dependent	400.00
	2,900.00
Balance (surtax net income).....	\$78,259.49
Less: Earned income credit	300.00
Net income subject to normal tax.....	\$77,959.49
Normal tax at 4% on \$77,959.49.....	\$ 3,118.38
Surtax on \$78,259.49.....	18,581.96
Total tax	\$21,700.34
Less: Income tax paid at the source.....	10.00
Correct income tax liability	\$21,690.34
Income tax assessed:	
Original, account No. 809480.....	9,656.84
Deficiency of income tax	\$12,033.50

[49]

ADJUSTMENTS TO NET INCOME

Taxable Year Ended December 31, 1938

Net income as disclosed by return	\$42,636.10
Additional income and unallowable deductions:	
(a) Income from trust	\$18,074.66
(b) Long-term capital gain	8,868.06
(c) Depreciation disallowed	491.82
(d) Loss disallowed	5,076.11
	32,510.65
Net income adjusted	\$75,146.75

Explanation of Adjustments

- (a) The portion of the income of the Gaylord Trust held to be taxable to you, as stated above, has been determined to be \$18,074.66, as follows:

Exhibit A—(Continued)

Net income reported in trust return, form 1041.....\$	0.00
Additions to income:	
1. Deduction for amount distributable to beneficiaries disallowed	\$15,899.86
2. Increase in long-term capital gain....	2,687.29
3. Adjustment of net income from rents	1,641.27
4. Loss disallowed	5,076.11
	<hr/>
Net income of trust as adjusted.....	\$25,304.53
Your portion, 5/7	\$18,074.66

[50]

1. For the purpose of determining the amount of income derived by the trust the deduction claimed for the amount distributable to beneficiaries is disallowed.

2. The increase in long-term capital gain in the amount of \$2,687.29 is due to the above noted decrease in basis of Marathon Paper Mills Company common stock from \$8.21 per share to \$2.83542 per share, resulting in a difference in realized gain, when applied to the 1,000 shares of the mentioned stock sold by the trust, of \$5,374.58, of which 50%, or \$2,687.29, is taken into account, under the provisions of section 117(b) of the Revenue Act of 1938.

3. This adjustment results from the determination of rental net income in the amount of \$6,282.91, whereas the amount reported in the trust return is \$4,641.64, a difference of \$1,641.27. The amount of \$6,282.91 has been determined as follows:

Exhibit A—(Continued)

Property	Rent Received	Depreciation	Other Expense	Net Profit
Alhambra	\$ 697.41	\$ 64.90	\$ 35.10	\$ 597.41
Amarillo	965.01	88.89	64.75	811.37
McAllen	1,893.54	181.82	127.26	1,584.46
Santa Monica	1,856.58	....	31.03	1,825.55
Harlingen	1,764.12	300.00	....	1,464.12
Total	\$7,176.66	\$635.61	\$258.14	\$6,282.91

4. The amount of \$5,076.11 deducted in the return filed by the trust as representing its proportionate share of loss sustained in the year 1938 by reason of the voluntary demolition [51] of a building in Santa Monica, California, is disallowed. It appears that the building in question was situated on land acquired in March, 1938 one-third each in the names of George S. Gaylord, Gertrude H. Gaylord and the Gaylord Trust and that it was razed early in January 1939 to make way for the erection of a new building. It is held that no deductible loss was sustained by reason of the demolition of the building in question. See Article 23(e)-2 of Regulations 101.

(b) This increase in the amount of long-term capital gain reported in your return is due to the above noted decrease in basis of Marathon Paper Mills Company common stock from \$8.21 per share to \$2.83542 per share, resulting in a difference in realized gain, when applied to the 3,300 shares of the mentioned stock sold by you, of \$17,736.11, of which 50%, or \$8,868.06, is taken into account under the provisions of section 117(b) of the Revenue Act of 1938.

Exhibit A—(Continued)

(c) This disallowance of depreciation is due to the following adjustments:

Property	Depreciation		
	Claimed	Allowed	Disallowed
1. Stucco and steel— Alhambra	\$ 155.50	\$ 129.79	\$ 25.71
2. Brick—Amarillo	200.00	88.89	111.11
3. Mushroom sheds	1,230.00	875.00	355.00
Totals	\$1,585.50	\$1,093.68	\$491.82

1. This property was acquired during the taxable year at a cost subject to depreciation of \$15,-575.36, having an [52] estimated remaining life of 30 years. Depreciation is allowable for 3 months of this taxable year.

2. This property was acquired during the taxable year at a cost subject to depreciation of \$3,-200.00, having an estimated remaining life of 18 years. Depreciation is allowable for 6 months of this taxable year.

3. The determination of the amount allowable is explained under adjustment (c) for the year 1936.

(d) The amount of \$5,076.11 deducted in your return as representing your proportionate share of loss sustained in the year 1938 by reason of the voluntary demolition of a building in Santa Monica, California, is disallowed for the reason stated under item 4 of adjustment (a) for this year.

Exhibit A—(Continued)
COMPUTATION OF TAX

Taxable Year Ended December 31, 1938

Tax Under Sections 11 and 12, Revenue Act of 1938

Net income adjusted	\$75,146.75
Less: Personal exemption	2,500.00
Balance (surtax net income)	\$72,646.75
Less: Earned income credit	300.00
Net income subject to normal tax.....	\$72,346.75
Normal tax at 4% on \$72,346.75.....	\$ 2,893.87
Surtax on \$72,646.75.....	15,998.10
Total tax under sections 11 and 12.....	\$18,891.97

[53]

Alternative Tax, Section 117(c)(1), Revenue
Act of 1938

Net income adjusted	\$75,146.75
Less: Net long-term capital gain	45,599.54
Ordinary net income	\$29,547.21
Less: Personal exemption	2,500.00
Balance (surtax net income).....	\$27,047.21
Less: Earned income credit	300.00
Net income subject to normal tax.....	\$26,747.21
Normal tax at 4% on \$26,747.21.....	\$ 1,069.89
Surtax on \$27,047.21.....	2,438.97
Partial tax	\$ 3,508.86
Plus: 30% of net long-term capital gain..	13,679.86
Alternative tax	\$17,188.72
Correct income tax liability (alternative tax).....	\$17,188.72
Income tax assessed:	
Original, account No. 805280	6,746.10
Deficiency of income tax	\$10,442.62

Exhibit A—(Continued)
ADJUSTMENTS TO NET INCOME

Taxable Year Ended December 31, 1939

Net income as disclosed by return.....	\$41,139.37
Additional income and unallowable deductions:	
(a) Income from trust	\$18,002.94
(b) Long-term capital gain	5,907.89
(c) Depreciation disallowed	1,016.69
(d) Farm loss disallowed	3,456.00
(e) Storm loss disallowed	1,400.00
	29,783.52
Net income adjusted	\$70,922.89

[54]

Explanation of Adjustments

(a) The portion of the income of the Gaylord Trust held to be taxable to you, as stated above, has been determined to be \$18,002.94, as follows:

Net income reported in trust return, form 1041.....\$ 0.00

Additions to income:

1. Deduction for amount distributable to beneficiaries	\$22,465.39
2. Increase in long-term capital gain....	1,074.92
3. Depreciation disallowed	1,663.81

Net income of trust as adjusted.....\$25,204.12

Your portion, 5/7\$18,002.94

1. For the purpose of determining the amount of income derived by the trust the deduction claimed for amount distributable to beneficiaries is disallowed.

2. The increase in long-term capital gain in the amount of \$1,074.92 is due to the above noted decrease in the basis of Marathon Paper Mills Company common stock from \$8.21 per share to

Exhibit A—(Continued)

\$2.83542 per share, resulting in a difference in realized gain, when applied to the 400 shares of the mentioned stock sold by the trust, of \$2,149.83, of which 50%, or \$1,074.92, is taken into account under the provisions of section 117(b) of the Internal Revenue Code. [55]

3. This adjustment results from the determination of allowable depreciation in the amount of \$2,001.29, whereas the amount claimed in the trust return is \$3,665.10, a difference of \$1,663.81. The amount of \$2,001.29 has been determined as follows:

Property	Date Acquired	Cost	Est. Rem. Life	Allowable Depreciation
Alhambra	1938	\$ 7,787.69	30	\$ 259.59
Amarillo	1938	3,200.00	18	177.77
Alice	1938	21,000.00	40	525.00
Harlingen	1937	12,000.00	40	300.00
McAllen	1938	8,000.00	22	363.64
Santa Monica	1939	11,258.60	30	375.29
				Total.....\$2,001.29

(b) This increase in the amount of long-term capital gain reported in your return is due to the above noted decrease in basis of Marathon Paper Mills Company common stock from \$8.21 per share to \$2.83542 per share with respect to 2,362 shares of the mentioned stock sold by you, and to an increase in basis from \$8.21 per share to \$17.00 per share with respect to 100 shares of the mentioned stock sold by you. These adjustments result respectively in an increase in realized gain of \$12,694.77 and a decrease in realized gain of \$879.00, or a net in-

Exhibit A—(Continued)

crease of \$11,815.77, of which 50%, or \$5,907.89, is taken into account under the provisions of section 117(b) of the Internal Revenue Code. [56]

(e) This disallowance of depreciation is due to the following adjustments:

Property	Depreciation		
	Claimed	Allowed	Disallowed
1. Stucco and steel—			
Alhambra	\$ 771.00	\$ 519.18	\$ 251.82
2. Brick—Amarillo	400.00	177.77	222.23
3. Mushroom sheds	1,230.00	875.00	355.00
4. Stucco and steel—			
Santa Monica	562.93	375.29	187.64
Totals.....	\$2,963.93	\$1,947.24	\$1,016.69

1 and 2. The basis of the determination of the amount allowable is explained under adjustment (b) for the preceding year.

3. The determination of the amount allowable is explained under adjustment (c) for the year 1936.

4. This property was acquired during the taxable year at a cost subject to depreciation of \$11,258.60, having an estimated remaining life of 30 years.

(d) In your return you reported a loss of \$7,366.47 as resulting from the operation of a farm. In the Schedule of Farm Income and Expenses, Form 1040F, filed with the return, a deduction of \$4,320.00 was taken for a loss claimed to have been sustained in the taxable year by reason of 432

Exhibit A—(Continued)

pear trees valued at \$10.00 each having been voluntarily pulled in 1939 to make room for more profitable crops and livestock. The loss so claimed is allowed in the amount [57] of \$864.00 under the provisions of section 23(e) of the Internal Revenue Code and Article 19.23(e)-3 of Regulations 103, and the balance thereof is disallowed as not representing a deductible loss.

(e) In your return you took a deduction of \$2,650.00 as representing your one-half of a loss of \$5,300.00 claimed to have resulted from the destruction by storm of ornamental trees on the personal residence property owned by you and Gertrude H. Gaylord, your wife. It is held that the total amount of the loss so sustained did not exceed \$2,500.00 and one-half of that amount or \$1,250.00 is allowed in lieu of the amount of \$2,650.00 deducted in the return.

COMPUTATION OF TAX

Taxable Year Ended December 31, 1939

Tax Under Sections 11 and 12, I.R.C.

Net income adjusted	\$70,922.89
Less: Personal exemption	2,500.00
<hr/>	
Balance (surtax net income)	\$68,422.89
Less: Earned income credit	300.00
<hr/>	
Net income subject to normal tax.....	\$68,122.89
Normal tax at 4% on \$68,122.89.....	\$ 2,724.92
Surtax on \$68,422.89.....	14,181.84
<hr/>	
Total tax under sections 11 and 12.....	\$16,906.76

Exhibit A—(Continued)

Alternative Tax, Section 117(c)(1), I.R.C.

Net income adjusted	\$70,922.89
Less: Net long-term capital gain	35,602.44
Ordinary income	\$35,320.45
Less: Personal exemption	2,500.00
Balance (surtax net income)	\$32,820.45
Less: Earned income credit	300.00
Net income subject to normal tax.....	\$32,520.45
Normal tax at 4% on \$32,520.45.....	\$ 1,300.82
Surtax on \$32,820.45.....	3,552.29
Partial tax	\$ 4,853.11
Plus: 30% of net long-term capital gain	10,680.73
Alternative tax	\$15,533.84
Correct income tax liability (alternative tax).....	15,533.84
Income tax assessed:	
Original, account No. 852592	6,327.02
Deficiency of income tax	\$ 9,206.82

[59]

EXHIBIT B

DECLARATION OF TRUST

Know All Men By These Presents:

That the undersigned, George S. Gaylord and Gertrude H. Gaylord, his wife, of the City of Pasadena, in the County of Los Angeles, State of California (who, though more than one, are also hereinafter called "trustee"), do hereby certify and declare that they hold and shall and will hold the fol-

Exhibit B—(Continued)

lowing described personal property, to-wit: seven thousand (7,000) shares of the common capital stock of Marathon Paper Mills Company, a Wisconsin corporation, of the par value of Twenty-Five Dollars (\$25.00) per share, and any and all proceeds thereof, In Trust, Nevertheless, for the following uses and purposes and upon the following terms and conditions, to-wit:

Article I.

The trustee shall, during the existence of this trust, in all respects as said George S. Gaylord (who was the former owner of five thousand (5,000) of said shares) or said Gertrude H. Gaylord (who was the former owner of two thousand (2,000) of said shares) could if he or she had absolute and unlimited ownership, possession, management, control and disposition of said shares and any and all proceeds thereof, take charge of and possess, manage and control all of said shares and all principal proceeds thereof and any and all investments and reinvest- [60] ments thereof and any and all property substituted for any of said stock, proceeds, investments and/or reinvestments (all of which said stock, the principal proceeds thereof, investments and reinvestments and property are hereinafter referred to as the "trust estate") and receive and collect the rents, issues, profits, interest, dividends and income of the trust estate. The trustee shall loan, reloan, invest, reinvest, and keep invested each and every part of the trust estate in such manner as the

Exhibit B—(Continued)

trustee may deem advisable, and for and/or in connection with any and/or all of the aforesaid purposes and/or any purpose of this trust shall sell, exchange, rent, lease, mortgage, pledge, hypothecate, convey, transfer, assign and dispose of the trust estate, real, personal and/or mixed, or any part thereof or any interest therein, at any time and from time to time and upon such terms and for such prices or considerations as the trustee may deem advisable. Without in any manner limiting any power or authority of the trustee as set forth in this instrument, the authority and power of the trustee hereinbefore set forth in this Article I shall include and be deemed to include the following authorizations, powers and rights in the trustee, to be exercised in the sole judgment and discretion of the trustee, to-wit: To hold, maintain, operate and/or continue, at the risk of the trust estate and as long as the trustee may deem advisable, any and all property and/or business which the trustee may receive [61] hereunder, whether or not the same are or is permissible by law as investment for trust funds, or the trustee may sell, exchange or dispose of the same. To partition, divide and/or subdivide. To rent and/or lease for a term of ninety-nine (99) years or for any lesser term or for any term which shall or may last or extend for any term beyond or after the termination of this trust, and to such lessee or lessees and for such rents and upon such covenants, agreements, provisions, conditions and stipulations as the trustee may determine. To im-

Exhibit B—(Continued)

prove the property of the trust estate and/or repair and/or keep in good order any and all improvements on the property of the trust estate, and to remove, substitute, alter and/or repair any improvement on any such property and/or add any improvement thereto. To borrow from time to time such sum or sums of money as the trustee may deem best to meet any cost or expense of the administration or execution of this trust if the trustee has not sufficient funds available of the trust estate to meet any such cost and/or expense. To fix the rate of interest and other terms of any such loan and to pay such interest on any such loan and to secure any such loan by mortgage, deed of trust, pledge or other lien upon or transfer of real, personal and/or mixed property of the trust estate or any part thereof. To loan the trustee's own funds to this trust at prevailing rates of interest, if such loan be necessary to meet any cost and/or expense of the administration and/or execution of this [62] trust and the trustee has not sufficient funds available of the trust estate therefor, any such loan with such interest thereon to be a first lien on the whole of the trust estate and the gross income therefrom and to be first repaid out of the gross income and/or principal of the trust estate. To in such manner and upon such terms as to the trustee shall seem best make all compromises and/or settlements which the trustee may deem necessary or proper as to any claim, question, matter or thing which may arise during or in the execution of this trust. To have

Exhibit B—(Continued)

respecting bonds, shares of corporate stock and other securities, whether similar or dissimilar, all the rights, powers and privileges of an owner, including, though without limiting the foregoing, holding securities in the trustee's own name or otherwise, voting, giving proxies, payment of calls, assessments and other sums deemed by the trustee expedient for the protection of the interests of the trust estate, exchanging securities, selling or exercising stock subscription or conversion rights, participating in foreclosures, reorganizations, consolidations, mergers, liquidations, pooling agreements and voting trusts, and assenting to corporate sales, leases and encumbrances; the trustee, however, to assume to be under no personal liability in respect of any such bonds, shares and/or other securities at any time held hereunder. To reimburse the trustee from the income and/or principal of the trust estate for any such liability or expense incurred by the [63] trustee by reason of the trustee's ownership and/or holding of any property received and/or held in this trust. All discretions in this trust conferred upon the trustee shall, unless specifically limited, be absolute and uncontrolled and their exercise conclusive on all persons interested in this trust or the trust estate. The powers and discretions of the trustee enumerated herein are not to be construed as a limitation upon the trustee's general powers and discretions but the trustee in addition thereto is vested with and shall have, for the

Exhibit B—(Continued)

full duration of this trust, as to the trust estate, the income therefrom, and in the execution of this trust, the same and all the powers and discretions that an absolute owner of property has or may have.

ARTICLE II.

The whole title, legal and equitable, in fee, to the trust estate, is and shall be vested in the trustee as such title in the trustee is necessary for the trustee's due execution of this trust. The beneficiaries hereunder take no estate or interest therein and their interests hereunder are personal property only consisting of the right to enforce the due performance of this trust.

ARTICLE III.

From the gross income of the trust estate and/or, if it be necessary, from the trust estate, the trustee shall first pay and discharge when due and payable any and all taxes, assessments and other charges imposed by [64] public authority on the trust estate or any part thereof, and may also first pay and discharge when due and payable any and all reasonable costs, expenses, charges and liabilities necessarily expended or incurred by the trustee in connection with the collection, care, administration, management or distribution of the trust estate and/or any part thereof and/or any income therefrom and/or the protection of the trust estate and/or any part thereof and/or this trust and/or

Exhibit B—(Continued)

its defense against legal, equitable and/or other attack, and also, if the trustee is a corporation and/or a person or persons other than said George S. Gaylord and/or Gertrude H. Gaylord above named (the word "corporation" including a national banking association) reasonable fees or compensation for the services of the trustee in the administration of this trust.

ARTICLE IV.

The entire net income received from the trust estate and available for distribution shall be paid and distributed by the trustee, either monthly, quarterly or semiannually as the circumstances and condition of the trust estate will most conveniently permit, but in any event annually, to Margaret Gaylord Ruppel and Gertrude Gaylord (who are the daughters of said George S. Gaylord and Gertrude H. Gaylord above named, the said Margaret Gaylord Ruppel having been born on the 10th day of November, 1904, and the said Gertrude Gaylord having [65] been born on the 31st day of May, 1916) and the survivor of said daughters Margaret Gaylord Ruppel and Gertrude Gaylord, share and share alike if both of them be then living; provided, however, that in the event of the death of either said Margaret Gaylord Ruppel or Gertrude Gaylord prior to the termination of this trust leaving surviving her any lawful issue, then the share of the net income of the trust estate which said Margaret Gaylord Ruppel or Gertrude Gaylord so

Exhibit B—(Continued)

dying would otherwise be entitled to receive and have paid to her if she had continued to live, shall be paid to such lawful issue of her as long as such lawful issue shall continue to live during the existence of this trust, such issue to take by right of representation and per stirpes and not per capita. While any beneficiary of this trust is a minor or otherwise legally incapacitated to handle personally any of the net income of the trust estate payable to him or her, then the same or any part thereof may by the trustee be paid to such beneficiary's duly appointed guardian or guardians, if any. Any part of the net income of the trust estate which the trustee would otherwise pay as in this Article IV above provided directly to any beneficiary of this trust and/or his or her guardian or guardians, if any, may, in the sole judgment and discretion of the trustee, instead of such direct payment by the trustee, be applied by the trustee to the use and/or for the proper care, maintenance and/or support and/or education [66] of such beneficiary.

ARTICLE V.

This trust shall ipso facto cease and terminate upon the happening of either of the following events, whichever shall first happen: the attainment of the age of thirty (30) years by said Gertrude Gaylord or her death prior to her attaining such age of thirty (30) years.

Exhibit B—(Continued)

ARTICLE VI.

Upon the termination of this trust as hereinabove in Article V provided, all of the trust estate then in the possession or under the control of the trustee as the same then exists, shall immediately vest in and be delivered, paid, conveyed, assigned and transferred by the trustee unto said Margaret Gaylord Rupper and Gertrude Gaylord or the survivor of them living at the time of said termination of this trust, share and share alike, however, if both of them shall then be living; provided, however, that in the event of the death of either of them prior to said termination of this trust leaving her surviving at the time of said termination of this trust lawful issue, then the share of the trust estate which said Margaret Gaylord Ruppel or Gertrude Gaylord so dying would have taken hereunder if she had been living at the time of said termination of this trust shall, upon said termination of this trust, immediately vest in and be delivered, paid, conveyed, assigned and transferred unto her said lawful issue, such lawful issue, however, to take per stirpes and by right of representation and not [67] per capita. In the event that upon the termination of this trust as hereinabove in Article V provided there shall then be living neither said Margaret Gaylord Ruppel nor said Gertrude Gaylord nor any lawful issue of either of them, then upon said termination of this trust all of the trust estate then in the possession

Exhibit B—(Continued)

or under the control of the trustee as the same then exists shall immediately vest in and be delivered, paid, conveyed, assigned and transferred unto said Gertrude H. Gaylord, the wife of said George S. Gaylord.

ARTICLE VII.

Every beneficiary of this trust is hereby restrained from in any manner anticipating, impairing, encumbering, alienating and/or disposing of his or her right, interest and/or estate, or any thereof, in and/or to any principal and/or income of the trust estate, and is without power so to do, nor shall any such right, interest and/or estate be subject to any liability or obligation of him or her or to any judgment, attachment, garnishment, execution, process of law, transfer by operation of law, bankruptcy proceeding or claim or demand of any creditor or other person than the beneficiary named. All payments, deliveries and distributions to be made under the provisions of this trust, unless in this declaration otherwise expressly provided, shall be payable, deliverable or distributable and only be made directly and personally to the beneficiary [68] or beneficiaries concerned and upon his, her or their personal receipt therefor and not otherwise, which personal receipt shall be a condition precedent to the making of any such payment, delivery or distribution.

Exhibit B—(Continued)

ARTICLE VIII.

In making any payment, distribution or delivery of any part of the principal of the trust estate the trustee shall make all divisions, partitions, allotments and distributions to effect such payment, delivery or distribution as and according to such method or procedure as the trustee may in the sole judgment and discretion of the trustee deem proper, and any and all acts of the trustee in determining the relative values of the property of the trust estate for the purpose of such division, partition, allotment, distribution and/or payment shall be conclusive on all persons interested therein. The trustee shall also make such conveyances, assignments and transfers and execute such writings and instruments as may be necessary to confirm in the payee, deliveree or distributee hereunder title and possession to the part of the principal of the trust estate so paid, delivered or distributed.

ARTICLE IX.

In the event that any provision or provisions of this instrument or trust is or are, or is or are adjudged by a court of competent jurisdiction to be for any reason invalid or unenforceable, then the remainder hereof, dis- [69] regarding such provision or provisions, shall subsist and be carried into effect. The invalidity of any use or trust herein declared, if ever decreed by a court of competent jurisdiction, shall not vitiate such as are valid.

Exhibit B—(Continued)

ARTICLE X.

Said George S. Gaylord and Gertrude H. Gaylord, his wife, or either of them, shall have the right at any time, with the written consent of the trustee but not otherwise, to add to this trust other property which, upon acceptance thereof by the trustee, shall become a part of the trust estate to be held in trust for the uses and purposes set forth in this instrument and upon all of the terms and conditions hereof.

ARTICLE XI.

Said George S. Gaylord and Gertrude H. Gaylord, his wife, or either of them, shall have the right at any time to resign as trustee of this trust by signing an instrument in writing declaring that they or he or she (as the case may be) so resigns as the trustee of this trust and acknowledging the execution of such instrument before a notary public or other officer authorized to take acknowledgments, which acknowledgment shall be certified so as to entitle the same to be recorded, and by recording such instrument in the office of the County Recorder of the County of Los Angeles, State of California. Said instrument in writing of such resignation shall be effective upon and as of the time of such recordation. In the event of the death of either said [70] George S. Gaylord or Gertrude H. Gaylord, or his or her resignation as trustee of this trust, or his or her inability or incapacity to

Exhibit B—(Continued)

act as such trustee, then the other one of said two persons, viz., George S. Gaylord and Gertrude H. Gaylord, shall act and be entitled to act as trustee of this trust and as such trustee shall have all rights, powers, authority, discretion and exemptions in this instrument provided for the trustee of this trust. Said George S. Gaylord shall have the right by an instrument in writing signed by him, and acknowledged by him before a notary public, or other officer authorized to take acknowledgments, which acknowledgment shall be certified so as to entitle the same to be recorded, and recorded in the office of said County Recorder, to appoint the successor or successors as the trustee (whether one or more) of this trust in the event that neither of the two original trustees of this trust, viz., said George S. Gaylord and Gertrude H. Gaylord, is acting as the trustee. In the absence of such appointment by said George S. Gaylord, said Gertrude H. Gaylord shall have the right by an instrument in writing signed by her and acknowledged by her before a notary public, or other officer authorized to take acknowledgments, and certified so as to entitle the same to be recorded, and recorded in the office of said County Recorder, to appoint such successor or successors as the trustee (whether one or [71] more) of this trust in the event that neither of the two original trustees of this trust, viz., said George S. Gaylord and Gertrude H. Gaylord, is acting as the trustee. In the event of the death of said George S. Gaylord or his resignation as

Exhibit B—(Continued)

trustee of this trust, or his inability or incapacity to act as such trustee, and of the death of said Gertrude H. Gaylord, or her resignation as the trustee of this trust, or her inability or incapacity to act as such trustee, then, in any such event and in the absence of any such appointment by said George S. Gaylord or Gertrude H. Gaylord of the successor or successors as such trustee, The Northern Trust Company, of Chicago, Illinois, any successor and/or assign of said corporation whether by way of consolidation, merger, transfer of trust business, conversion into a state bank or otherwise, shall ipso facto succeed and act as the trustee of this trust.

ARTICLE XII.

The word "trustee" as used in this instrument, means, unless otherwise expressly indicated, not only said first named trustee George S. Gaylord and Gertrude H. Gaylord and the survivor of them, but as well their successor or successors or the successor or successors of either of them as trustee or trustees (as the case may be) of this trust, the singular number including the plural where necessary. No bond or bonds of other security whatever shall ever be [72] required of the trustee for the performance of any duty or trust hereunder.

In Witness Whereof said George S. Gaylord and Gertrude H. Gaylord as trustee have set their hands and seals to this instrument this 7th day of November, 1935, at Pasadena, California.

Exhibit B—(Continued)

Executed in Quadruplicate.

(Seal) GEORGE S. GAYLORD

(Seal) GERTRUDE H. GAYLORD

State of California,

County of Los Angeles—ss.

On this 11th day of December, 1935, before me J. C. Humphreys, a Notary Public in and for said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared George S. Gaylord and Gertrude H. Gaylord, his wife, personally known to me to be the persons whose names are subscribed to the within and foregoing instrument, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in said county the day and year in this certificate first above written.

(Notarial Seal) J. C. HUMPHREYS

Notary Public in and for the County of Los Angeles, State of California. [73]

State of California,

County of Los Angeles—ss.

Before me, the undersigned authority, a Notary Public in and for Los Angeles County, California, on this day personally appeared George S. Gaylord and Gertrude H. Gaylord, his wife, both known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to

Exhibit B—(Continued)

me that they each executed the same for the purposes and consideration therein expressed, and the said Gertrude H. Gaylord, wife of the said George S. Gaylord, having been examined by me privily and apart from her husband and having the same fully explained to her, she, the said Gertrude H. Gaylord, acknowledged such instrument to be her act and deed, and she declared that she had willingly signed the same for the purposes and consideration therein expressed, and that she did not wish to retract it.

Given Under My Hand and Seal of Office, this 6th day of January, 1938.

(Notarial Seal) J. C. HUMPHREYS
Notary Public in and for Los Angeles County,
California

My commission expires June 29th 1939 [74]

EXHIBIT C**DECLARATION BEING PART OF A CERTAIN DECLARATION OF TRUST DATED NOVEMBER 7, 1935.**

Know All Men By These Presents:

That Whereas the undersigned, George S. Gaylord and Gertrude H. Gaylord, his wife, of the City of Pasadena, in the County of Los Angeles, State of California, do in and by an instrument of even date herewith entitled Declaration of Trust certify and declare and in and by said instrument have

certified and declared that they hold and shall and will hold the following described personal property, to-wit: seven thousand (7,000) shares of the common capital stock of Marathon Paper Mills Company, a Wisconsin corporation, of the par value of Twenty-five Dollars (\$25.00) per share, and any and all proceeds thereof, In Trust, Nevertheless, for the uses and purposes and upon the terms and conditions set forth in said Declaration of Trust, reference to which Declaration of Trust is hereby made for further particulars thereof; Now, Therefore, said George S. Gaylord and Gertrude H. Gaylord do further certify and declare that the trust created and provided for in said Declaration of Trust was always intended and is intended by said trustors and trustees, George S. Gaylord and Gertrude H. Gaylord, to be and is and shall always be absolutely irrevocable and that this further declaration of said undersigned is and is intended to be and shall always be [75] a part of said Declaration of Trust and is and is intended to be and shall always be taken with and construed as a part of said Declaration of Trust the same as though this present declaration had been physically incorporated in said Declaration of Trust.

In Witness Whereof, said George S. Gaylord and Gertrude H. Gaylord, said trustors and trustees, have set their hands and seals to this instrument as of this 7th day of November, 1935, At Pasadena, California.

Executed in Quadruplicate.

(Seal) GEORGE S. GAYLORD

(Seal) GERTRUDE H. GAYLORD

State of California,
County of Los Angeles—ss.

George S. Gaylord, being first duly sworn, deposes and says that he is the George S. Gaylord named in the foregoing instrument and that he has read and understands the same and that all statements made in said instrument are and each of said statements is true and correct.

GEORGE S. GAYLORD

Subscribed and sworn to before me this 27th day of March, 1940.

(Notarial Seal) J. C. HUMPHREYS
Notary Public in and for the County of Los Angeles, State of California. [76]

State of California,
County of Los Angeles—ss.

Gertrude H. Gaylord, being first duly sworn, deposes and says that she is the Gertrude H. Gaylord named in the foregoing instrument and that she has read and understands the same and that all statements made in said instrument are and each of said statements is true and correct.

GERTRUDE H. GAYLORD

Subscribed and sworn to before me this 27th day of March, 1940.

(Notarial Seal) J. C. HUMPHREYS
Notary Public in and for the County of Los Angeles, State of California.

State of California,
County of Los Angeles—ss.

On this 27th day of March, 1940, before me, J. C. Humphreys, a Notary Public in and for said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared George S. Gaylord and Gertrude H. Gaylord, his wife, personally known to me to be the persons whose names are subscribed to the within and foregoing instrument, and acknowledged to me that they executed the same. [77]

In Witness Whereof, I have hereunto set my hand and affixed my official seal in said county the day and year in this certificate first above written.
(Notarial Seal) J. C. HUMPHREYS
Notary Public in and for the County of Los Angeles, State of California.

State of California,
County of Los Angeles—ss.

Before me, the undersigned authority, a Notary Public in and for Los Angeles County, California, on this day personally appeared George S. Gaylord and Gertrude H. Gaylord, his wife, both known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they each executed the same for the purposes and consideration therein expressed, and the said Gertrude H. Gaylord, wife of the said George S. Gaylord, having been examined by me privily and apart from her husband and having the same fully explained to her, she, the said Gertrude H. Gay-

lord, acknowledged such instrument to be her act and deed, and she declared that she had willingly signed the same for the pur- [78] poses and consideration therein expressed, and that she did not wish to retract it.

Given Under My Hand and Seal of Office, this 27th day of March, 1940.

(Notarial Seal) J. C. HUMPHREYS

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires June 26, 1943. [79]

6th Calif.

556

2,531.27

EXHIBIT D

GIFT TAX RETURN

Treasury Department
Internal Revenue
Service

CALENDAR YEAR 1935

(To be filed in duplicate under the provisions of
the Gift Tax Act of 1932, as Amended)

Revised

December 1934

Name of Donor George S. Gaylord
Address: 639 Rosemont Ave Pasadena Calif
Citizenship U S A
Residence above

(Space for use of
Bureau)

(Space for use of
Collector)

Have you (the donor), during the calendar year indicated above, without an adequate and full consideration in money or money's worth, made any transfer exceeding \$5,000 in value (or regardless of value if a future interest) as follows? (Answer "Yes" or "No.")

Exhibit D—(Continued)

1. By the creation of an irrevocable trust for the benefit of another: yes; no;
2. By making additions to an irrevocable trust previously created for the benefit of another: no;
3. By permitting a beneficiary (other than yourself) to receive the income from a revocable trust, where you possessed the power of revocation and chose during the year not to exercise it, whether such trust was created before or after the enactment, on June 6, 1932, of the Gift Tax Act of 1932: no;
4. By relinquishing a power to revoke a trust created for the benefit of another: no;
5. By permitting another to withdraw funds from a joint bank account which were deposited by you: no;
6. By irrevocably assigning a life insurance policy, or by naming a beneficiary of a policy without retaining any of the legal incidents of ownership therein: yes;
7. By paying a premium under an insurance policy in which you retain none of the legal incidents of ownership and the proceeds of which are payable to a beneficiary other than yourself or your estate: no;
8. By conveying title to another and yourself as joint tenants or to your wife or husband and yourself as tenants by the entirety: no;
9. by any other method, direct or indirect, whereby another received a gift: no.

If the answer is "Yes" to any of the foregoing, such transfer should be fully disclosed under Schedule A or B.

Exhibit D—(Continued)

COMPUTATION OF AMOUNT OF NET
GIFTS FOR YEAR

CS

1.	Amount of gifts for year other than charitable, etc., gifts (item e, schedule A)	\$125,278.08
2.	Amount of charitable, public, and similar gifts for year (item e, schedule B)	50.00
3.	Total amount of gifts for year (item 1 plus item 2).....	\$125,328.08
4.	Amount of charitable, public, and similar gifts for year (item e, schedule B)	50.00
5.	Specific exemption claimed (not exceeding \$50,000, less total amount of specific exemption claimed for preceding years)	50,000.00
6.	Total deductions (item 4 plus item 5).....	50,050.00
7.	Amount of net gifts for year (item 3 minus item 6)	\$ 75,278.08

[80]

COMPUTATION OF TAX

1.	Amount of net gifts for year (item 7, above).....	\$ 75,278.08
2.	Total amount of net gifts for preceding years (item b, schedule C) 1st sup. Int. 2.97.....	0.00
3.	Total net gifts (item 1 plus item 2).....	\$ 75,278.08
4.	Tax computed on item 3	
5.	Tax computed on item 2.....	
6.	Tax on net gifts for year (item 4 minus item 5)	\$ 2,531.27

Exhibit D—(Continued)
AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements, if any, has been examined by me, and to the best of my knowledge and belief, is a true, correct, and complete return for the calendar year stated, pursuant to the Gift Tax Act of 1932, as amended, and the regulations issued thereunder, and no transfer required by said law and regulations to be returned other than the transfer or transfers disclosed herein under schedules A or B was made by me (the donor) during said calendar year.

G. S. GAYLORD

(Signature of donor/executor)

Sworn to and subscribed before me this 3rd day of February, 1936.

(Notarial Seal)

ALICE F. JACKSON

(Signature and title of officer administering oath)

[81]

SCHEDULE A.—GIFTS DURING YEAR OTHER THAN CHARITABLE, PUBLIC, AND SIMILAR GIFTS

Item No.	Description of gift, motive, donee's name and address, and relationship to donor	Date of Gift	Value at Date of Gift
5000	Shares of common stock of Marathon Paper Mills Co. of Wausau, Wis., to a trust for benefit of Margaret G. Ruppel and Gertrude Gaylord my daughters	Nov 7 1935	\$125,000.00 OK e25
1	5 room residence 1015 Davis St., Glendale, Calif., assessed by county tax appraiser at \$1200.00 1935: Tract 5086 as per book 110, Pages 63-64 map of Los Angeles County	June 11 '35	3000. mo R e100

Exhibit D—(Continued)

Schedule A—(Continued)

Item No.	Description of gift, motive, donee's name and address, and relation- ship to donor	Date of Gift	Value at Date of Gift
10	Shares Latisteel Corp. 1310		1000.00
No	E. Foothill Blvd., Pasadena,		
data	Calif., new corporation		
SWE	100.00 par. 1000.00 repre- sents amount paid in on above stock	Dec 12 1935	SWE
1	Northwestern Mutual Life Ins. Co. policy 653962, see attached	Dec 13 '35	1800.06
1	Northwestern Mutual Life Ins. Co. policy 912851, see attached	Dec 13 '35	1499.33
1	Northwestern Mutual Life Ins. Co. policy 2037662, see attached	Dec 13 '35	7662.85
1	New York Life Ins. Co. pol- icy 6175331, see attached..... All above Insurance policies conveyed to Gertrude H. Gaylord, my wife, Margaret G. Ruppel and Gertrude Gaylord, my daughters, share and share alike or to the survivors.	Dec 10 '35	315.84
(a)	Total	\$140,278.08	
(b)	Less total exclusions not exceeding \$5,000 for each donee (except future interests).....	15,000.00	
(c)	Included amount of gifts for year other than charitable, etc., gifts	\$125,278.08	

Exhibit D—(Continued)

SCHEDULE B.—CHARITABLE, PUBLIC, AND SIMILAR GIFTS DURING YEAR

Item No.	Description of gift, name and address of donee, and character of institution	Date of Gift	Value at Date of Gift
	Community Chest of Pasadena Calif	July 1935	\$50.00
(a) Total		\$	
(b) Less total exclusions not exceeding \$5,000 for each donee (except future interests).....			.....
(c) Included amount of charitable, public and sim- ilar gifts for year		\$	

SCHEDULE C.—RETURNS, AMOUNTS OF SPECIFIC EXEMPTION, AND NET GIFTS FOR PRECEDING YEARS (Subsequent to June 6, 1932)

[Followed by printed form not filled in]

[82]

Northwestern Mutual Life Insurance Company—face of policy \$2500.00, issued March 2, 1906, #653962 net cash value December 13, 1935, \$1800.06 paid up as to premiums. Straight Life.

Northwestern Mutual Life Insurance Company—face of policy \$3000.00, issued February 1, 1912, #912851 net cash surrender value December 13, 1935 \$1499.33 paid up as to premiums. Straight Life.

Northwestern Mutual Life Insurance Company—face of policy \$50,000.00, issued Dec. 1, 1927 #2037662 net cash surrender value December 13, 1935, \$10,930.94 less loan on policy \$3267.09 equals net value \$7662.85 premiums \$2131.00 Straight Life.

New York Life Insurance Company—face of policy \$8415.00 issued July 28, 1917 #6175331 net cash surrender value December 10, 1935. \$5145.84 less loan against same \$4830 equals \$315.84 net value. Straight Life.

All values furnished by Insurance Cos.

[83]

Form 709

EXHIBIT E
GIFT TAX RETURNTreasury Department
Internal Revenue
Service

CALENDAR YEAR 1935

Revised December 1934

(To be filed in duplicate under the provisions of the
Gift Tax Act of 1932, as Amended)(Space for use of
Bureau)(Space for use of
Collector)Name of Donor Gertrude H. Gaylord
Address 639 Rosemont Ave., Pasadena, Calif.
Citizenship U S A
Residence Above

S

Have you (the donor), during the calendar year indicated above, without an adequate and full consideration in money or money's worth, made any transfer exceeding \$5,000 in value (or regardless of value if a future interest) as follows? (Answer "Yes" or "No."): Yes.

Exhibit E—(Continued)

1. By the creation of an irrevocable trust for the benefit of another: yes;
2. By making additions to an irrevocable trust previously created for the benefit of another: no;
3. By permitting a beneficiary (other than yourself) to receive the income from a revocable trust, where you possessed the power of revocation and chose during the year not to exercise it, whether such trust was created before or after the en-

- actment, on June 6, 1932, of the Gift Tax Act of 1932: no;
4. By relinquishing a power to revoke a trust created for the benefit of another: no;
5. By permitting another to withdraw funds from a joint bank account which were deposited by you: no;
6. By irrevocably assigning a life insurance policy or by naming a beneficiary of a policy without retaining any of the legal incidents of ownership therein: no;

7. By paying a premium under an insurance policy in which you retain none of the legal incidents of ownership and the proceeds of which are payable to a beneficiary other than yourself or your estate: no;
8. By conveying title to another and yourself as joint tenants or to your wife or husband and yourself as tenants by the entirety: no;
9. By any other method direct or indirect, whereby another received a gift: no.

If the answer is "Yes" to any of the foregoing, such transfer should be fully disclosed under schedule A or B.

Exhibit E—(Continued)

COMPUTATION OF AMOUNT OF NET
GIFTS FOR YEAR

CS

1.	Amount of gifts for year other than charitable, etc., gifts (item c, schedule A)	\$40,000.00
2.	Amount of charitable, public, and similar gifts for year (item c, schedule B)	0
3.	Total amount of gifts for year (item 1 plus item 2)	\$40,000.00
4.	Amount of charitable, public, and similar gifts for year (item c, schedule B)	0
5.	Specific exemption claimed (not exceeding \$50,000, less total amount of specific exemption claimed for preceding years)	\$40,000.00
6.	Total deductions (item 4 plus item 5).....	40,000.00
7.	Amount of net gifts for year (item 3 minus item 6)	\$ 0

[84]

COMPUTATION OF TAX
[Followed by printed form not filled in]

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements, if any, has been examined by me, and to the best of my knowledge and belief, is a true, correct, and complete return for the calendar year stated, pursuant to the Gift Tax Act of 1932, as amended, and the regulations issued thereunder, and no transfer required by said law and regulations to be returned other than the transfer or transfers disclosed herein under schedules A or B was made by me (the donor) during said calendar year.

GERTRUDE H. GAYLORD

(Signature of donor/executor)

Exhibit E—(Continued)

Sworn to and subscribed before me this 3rd day of February, 1936.

(Notarial Seal)

ALICE F. JACKSON

(Signature and title of officer administering oath)

AFFIDAVIT

I swear (or affirm) that I prepared this return for the person named herein and that this return, including the accompanying schedules and statements, if any, is a true, correct, and complete statement of all the information respecting the donor's gift tax liability of which I have any knowledge.

G. S. GAYLORD D

(Signature of person preparing return)

Sworn to and subscribed before me this 3rd day of February, 1936.

(Notarial Seal)

ALICE F. JACKSON

(Signature and title of officer administering oath)

[85]

SCHEDULE A.—GIFTS DURING YEAR OTHER THAN CHARITABLE, PUBLIC, AND SIMILAR GIFTS

Item No.	Description of gift, motive, donee's name and address, and relationship to donor	Date of Gift	Value at Date of Gift
2000	Shares of Common Stock of Marathon Paper Mills Co. of Wausau Wis at 25 Data submitted Geo. S. Gaylord F. B. X ref. donee says 7000 shs?	Nov 7 1935	OK \$50,000.00

Exhibit E—(Continued)

Schedule A.—(Continued)

(a) Total	\$50,000.00
(b) Less total exclusions not exceeding \$5,000 for each donee (except future interests)	10,000.00
(c) Included amount of gifts for year other than charitable, etc., gifts	\$40,000.00

SCHEDULE B.—CHARITABLE, PUBLIC, AND SIMILAR GIFTS DURING YEAR

Item No.	Description of gift, name and address of donee, and character of Institution	Date of Gift	Value at Date of Gift
	None		\$
(a) Total	\$		
(b) Less total exclusions not exceeding \$5,000 for each donee (except future interests) .....	.....	
(c) Included amount of charitable, public, and similar gifts for year	\$		

SCHEDULE C.—RETURNS, AMOUNTS OF SPECIFIC EXEMPTION, AND NET GIFTS FOR PRECEDING YEARS (Subsequent to June 6, 1932)

Calendar Year	Collection District in which Prior Return was filed	Amount of Specific Exemption	Amount of Net Gifts
	None	\$	\$
(a) Total amount of specific exemption claimed for preceding years	\$		
(b) Total amount of net gifts for preceding years	\$		

EXHIBIT F

SHOWING COST OF MARATHON PAPER
MILLS COM. STOCK

Menasha Printing and Carton Co.

Value March 1, 1913	\$350,000.00
July 1, 1917 invested	152,500.00
	<hr/>
Less—Preferred stock sold July 1917.....	20,000.00
	<hr/>
	\$482,500.00

Received for 3,357 shares Menasha Printing and Carton Co. stock, securities of Marathon Paper Mills Co., as follows:

\$1,038,000.00 par 5½% Bonds.....	\$ 1,038,000.00
6,728 shares common stock at 130.30	876,658.40
	<hr/>
	\$ 1,914,658.40

\$1,038,000.00 equals 54.21% of total received

\$ 876,658.40 equals 45.79% of total received

45.79% of \$482,500.00 equals \$220,936.75 or original cost of 6,728 shares of common stock or \$32.84 per share.

Stock was divided four for one, making original cost of present common shares \$8.21 per share.

[87]

EXHIBIT G

MEMORANDUM SHOWING HOW VALUE OF STOCK OF MARATHON PAPER MILLS COMPANY, OWNED BY GEORGE S. GAYLORD, IS ESTABLISHED

This stock originated with various investments in Menasha Carton Company, a corporation, which was merged August 1917, with Menasha Printing Company to form the Menasha Printing & Carton Company. The basis for the new securities issued

in this merger was the actual value of physical assets of the merged companies which were appraised at \$186,000.00 for the Menasha Carton Company, and \$774,000.00 for the Menasha Printing Company. Common stock in the amount of \$500,000.00 par value and preferred stock or bonds in the amount of \$460,000.00 par value were issued by the new company. As the new securities were issued for physical assets only, the par value of the stock and bonds issued does not reflect the fair market value. The fair market value includes goodwill valued under ordinary circumstances by taking the average earnings for a number of years just prior to date value is to be determined. As the Menasha Carton Company is the Company in which Mr. Gaylord's holdings originated, and on which the value of his holdings in Marathon Paper Mills Company depended, it becomes necessary to arrive at the value as of August 1917 of his interest in that company as his basis for his Marathon Paper Mills Company stock.

Due to the entry of the United States in war in 1917, business in most every line had increased materially over the preceding years and the value of the business could not be [88] calculated on the basis of the prior years. More weight necessarily had to be given to the present and future, particularly when a business had just started a few years prior to that time. Market quotations for stocks generally had reached a very high level by August 1917. The earnings of Menasha Carton Company, Menasha Printing Company and the consolidated

company, obtained from old records of the companies show a very rapid rise starting in 1917, which continued through the subsequent years, substantiating the value existing in 1917. These earnings are as follows:

	Menasha Carton Company	Menasha Printing Company	Consolidated Company
1915	\$29,369.09	\$ 99,889.97	\$
1916	28,225.90	286,271.56	.....
1917 (a)	56,220.99	.....	(b) 303,236.91
1918	.....	.....	297,825.12
1919	.....	.....	282,595.87

- (a) Seven months only—same basis for twelve months—
\$96,378.84
 (b) Includes \$38,289.80 Carton Company profits for five months.

Tax payer believes that the 1917 earnings of the Carton Company capitalized at ten per cent reflect correctly the fair market value of the stock of that company establishing the basis of his stock in Marathon Paper Mills Company although subsequent earnings of the new company are much greater. The rate per share of Marathon stock is arrived by using the value of Marathon Carton Company stock as of August 1, 1917, based upon earnings for the first seven months of that year capitalized at 10% as follows: [89]

Value of Carton Company stock, August 1917.....	\$963,788.40
G. S. Gaylord's share—337/726	\$447,378.40
Additional amount paid for shares in new corporation	152,161.11
Total basis 1,960 shares Menasha Printing & Carton Co. and 190 shares of preferred stock (or bonds)	599,539.51

Less—preferred stocks (or bonds) sold.....	19,000.00
Net value of stock (average per share \$296.194)	\$580,539.51
	[90]

**COMPUTATION OF BASIS OF MARATHON PAPER
MILLS COMPANY STOCK**

Value of Menasha Carton Company stock August 1917, based upon earnings of Carton Co. seven months of 1917	\$963,788.40
G. S. Gaylord share (337/726).....	447,378.40
Additional amount paid to acquire 1960 shares of common and 190 shares of preferred (also referred to as bonds) Menasha Printing and Carton Co....	152,161.11
	599,539.51
Less—value allocated to preferred stock or bonds (later retired)	19,000.00
Net value of common stock (1960 shares).....	580,539.51
Value per share \$296.194	
Deduct cost of sales to employees prior to January 1, 1925—185 shares at \$296.194.....	54,795.89
Net value of 1,775 shares.....	525,743.62
Stock dividend (1-2-25) 100%—reduces value per share to \$148.097, and increases number of shares to 3,550.	
Less—Cost of—	
350 shares exchanged for 432 shares Robert Gaylord, Inc. (1-2-25)—	
350 shares at \$148.097.....	\$ 51,833.95
195 shares sold 10-5-25 and 4-1-26 at 148.097	28,878.92 80,712.87
Remaining value for 3,005 shares (\$148.097 per share)	445,030.75

Add—352 shares acquired (8-24-27) from C. W. Gaylord for 432 shares of Robert Gaylord, Inc. (value based upon value of 3357 shares owned after this was acquired, all of which was exchanged for \$1,914,658.40 in stock and bonds of new corporation—352/3357 of \$1,914,658.40..... 200,762.51

Cost of Marathon stock and bonds..... 645,793.26

[91]

Bonds 54.21% of \$645,793.26 or \$350,084.53

Stock 45.79% of \$645,793.26 or \$295,708.73

Basis for each share—

$\$295,708.73 \div 6728 = 43.952$ per share

Stock split—4 for 1 December 2, 1929, reducing price to \$10.988 correct basis for all shares sold by George S. Gaylord in 1935, 1936, 1937, 1938 and all excepting last 100 shares sold in 1939, and for all shares sold by Gertrude H. Gaylord acquired by gift from George S. Gaylord, 2-9-32 and for all shares sold by the trustees out of the trust estate acquired from George S. Gaylord and Gertrude H. Gaylord in 1935. The last 100 shares acquired by George S. Gaylord was purchased at \$17.00 per share.

Note—Stock transactions prior to consolidation with Marathon Paper Mills Co. are set forth in Revenue Agents report dated January 20, 1941, on George S. Gaylord in Exhibit A.

[Endorsed]: U.S.B.T.A. Filed Nov. 10, 1941.

[92]

[Title of Board and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the taxes in controversy are income taxes for the calendar years 1936, 1937, 1938 and 1939; denies the remainder of the allegations contained in paragraph 3 of the petition.

4. (I) to (LII), inclusive. Denies the allegations of error contained in paragraphs (I) to (LII), inclusive, of paragraph 4 of the petition.

5. (a) The respondent admits that as of November 7, 1935, the petitioner, George S. Gaylord, and his wife, [93] Gertrude H. Gaylord, executed a certain declaration of trust in which they named themselves as "trustee" (sic) and their two daughters, Margaret Gaylord Ruppel and Gertrude Gaylord, as beneficiaries, and in the event of the death of either or both of them during the existence of the trust, the issue of either or both of them, as the case might be, due to the death of one or both of the first-named beneficiaries.

Respondent also admits that the trust embraced the property substantially of the kind and amount described by the petitioner, but because respondent does not know as a matter of fact whether or not it

was recorded in the places and under the circumstances stated by the petitioner, and does not know as a matter of fact whether or not the purported gift tax returns were filed and gift taxes paid thereon in the manner and form related by petitioner, and does not know as a matter of fact whether the other matter and things related by petitioner existed, happened or were done in the manner and at the time stated by the petitioner in said subparagraph (a) of paragraph 5 of the petition, the respondent therefore, for lack of information sufficient upon the basis of which to form a belief as to the truth or accuracy thereof, denies each and every allegation contained in said subparagraph (a) not expressly admitted. Furthermore, respondent denies that the trust dated November 7, 1935, created by the petitioner was an irrevocable trust.

[94]

(b) Denies the allegations contained in subparagraph (b) of paragraph 5 of the petition.

(c) Respondent admits that the two named beneficiaries of said trust, Margaret Gaylord Ruppel and Gertrude Gaylord Bruce (named in said declaration of trust as Gertrude Gaylord), are the daughters of the petitioner, George S. Gaylord, and said Gertrude H. Gaylord, his wife, and that said Margaret Gaylord Ruppel was born on November 10, 1904, and said Gertrude Gaylord Bruce was born on May 31, 1916, and that each of said beneficiaries has lawful issue now living. Repondent also admits that said Margaret Gaylord Ruppel has two children now living, to-wit, a daughter, Barbara

Brunker, who was born October 14, 1925, and a son, Robert Brunker, born June 3, 1928. It is further admitted that said Gertrude Gaylord Bruce has one child, to-wit, a daughter, Ann Bruce, born April 20, 1938. For lack of information sufficient upon the basis of which to form a belief as to the truth or accuracy of the remaining allegations of said subparagraph (c) of paragraph 5 of the petition, respondent denies the same.

(d) Denies the allegations contained in subparagraph (d) of paragraph 5 of the petition. [95]

(e) For lack of information sufficient upon the basis of which to form a belief as to the truth or accuracy of subparagraph (e) of paragraph 5 of the petition, respondent denies the same.

(f) Denies the allegations contained in subparagraph (f) of paragraph 5 of the petition.

(g) For a lack of information sufficient upon the basis of which to form a belief as to the truth or accuracy of subparagraph (g) of paragraph 5 of the petition, respondent denies the same.

(h) and (i). Denies the allegations contained in subparagraphs (h) and (i) of paragraph 5 of the petition.

(j) (1) and (2). Denies the allegations contained in subparagraph (j), and subsections (1) and (2) thereof, of paragraph 5 of the petition.

(k) Denies the allegations contained in subparagraph (k) of paragraph 5 of the petition.

(l) Admits that in or about March, 1938, the petitioner, George S. Gaylord, in his individual capacity, and his said wife, Gertrude H. Gaylord,

in her individual and personal capacity, for the heretofore mentioned trust, by its trustees George S. Gaylord and Gertrude H. Gaylord, purchased each an undivided one-third interest in business property situated in the City of Santa Monica, California, consisting at the [96] time, of land improved with a storeroom building occupied by several different tenants holding under separate rental contracts or leases, and admits that during said year that the building was acquired the above-described owners thereof demolished and razed the old building and commenced the erection of the new building, but denies that the petitioner and his co-owners, as he alleges, did not contemplate and intend at the time of the purchase of said property of said property to demolish the old building that was thereon and to erect in the place thereof a new building.

(m) Admits that the petitioner, George S. Gaylord, acquired a so-called ranch near Carmel, California, part of which was devoted to a pear orchard containing several hundred trees. For lack of information sufficient upon the basis of which to form a belief as to the truth or accuracy of the remaining allegations of said subparagraph(m) of paragraph 5 of the petition, respondent denies the same.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied. [97]

Wherefore it is prayed that the determination of the Commissioner be approved.

(Signed) J. P. WENCHEL

EAT

Chief Counsel,

Bureau of Internal Revenue.

Of Counsel:

ALVA C. BAIRD,

Division Counsel.

FRANK T. HORNER,

B. M. COON,

Special Attorneys,

Bureau of Internal Revenue.

BMC/fmt 12/3/41

[Endorsed]: U.S.B.T.A. Filed Dec. 9, 1941. [98]

United States Board of Tax Appeals

Docket No. 109273

GERTRUDE H. GAYLORD,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency LA:IT:90D:PB, dated Sep. 17, 1941, and as a basis of her proceeding alleges as follows:

1. The petitioner is an individual with her residence at No. 639 Rosemont Avenue, Pasadena, California. The returns for the periods here involved were filed with the Collector for the Sixth District of California at Los Angeles, California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on the 17th day of September, 1941.

3. The taxes in controversy are income taxes for the calendar years 1936, 1937, 1938 and 1939 and in the amount of \$8,043.63.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors: [99]

(I) The Commissioner of Internal Revenue (hereinafter for brevity referred to as "Commissioner") erred in determining that there was or is an income tax liability of the petitioner in the sum of \$1,133.38 or any other sum or amount whatsoever other than \$49.03 on or with respect to the or any income of the petitioner for the year 1936.

(II) The Commissioner erred in determining that there was or is a deficiency of \$1,087.40 or any other sum or amount whatsoever in excess of \$49.03 in or with respect to any such tax liability or that there was or is any deficiency or unpaid tax or liability therefor of the petitioner on or with respect to her income for the year 1936 other than \$3.05.

(III) The Commissioner erred in determining that there was or is an income tax liability of the petitioner in the sum of \$14,627.77 or any other

sum or amount whatsoever on or with respect to the or any income of the petitioner for the year 1937.

(IV) The Commissioner erred in determining that there was or is a deficiency of \$4,925.01 or any other sum or amount whatsoever in or with respect to any such tax liability or that there was or is any deficiency or unpaid tax or liability therefor of the petitioner on or with respect to her income for the year 1937.

(V) The Commissioner erred in determining that there was or is an income tax liability of the petitioner in the sum of \$32.51 or any other sum or amount whatsoever on or [100] with respect to the or any income of the petitioner for the year 1938.

(VI) The Commissioner erred in determining that there was or is a deficiency of \$32.51 or any other sum or amonut whatsoever in or with respect to any such tax liability or that there was or is any deficiency or unpaid tax or liability therefor of the petitioner on or with respect to her income for the year 1938.

(VII) The Commissioner erred in determining that there was or is an income tax liability of the petitioner in the sum of \$3,381.23 or any other sum or amount whatsoever on or with respect to the or any income of the petitioner for the year 1939.

(VIII) The Commissioner erred in determining that there was or is a deficiency of \$1,998.71 or any other sum or amount whatsoever in or with resepct to any such tax liability or that there was or is any deficiency or unpaid tax or liability there-

for of the petitioner on or with respect to her income for the year 1939.

(IX) The Commissioner erred in determining that there was or is a total liability of \$19,174.89 or any other sum or amount whatsoever of the petitioner on or with respect to her income in or for the years 1936, 1937, 1938 and 1939 or any thereof.

(X) The Commissioner erred in determining that there was or is a total deficiency of \$8,043.63 or any other sum or amount whatsoever on or with respect to the income [101] taxes or any income tax or income tax liability of the petitioner on or with respect to the income of the petitioner for the years 1936, 1937, 1938 and 1939 or any of said years.

(XI) The Commissioner erred in determining or holding that the net income as adjusted for the taxable years 1936, 1937, 1938 and 1939 or for any of said years or any net income for said years or any thereof of the trust created by the declaration of trust dated November 7, 1935, made by George S. Gaylord and his wife Gertrude H. Gaylord, of which trust the petitioner and her said husband are first named trustees and their two daughters Margaret Gaylord Ruppel and Gertrude Gaylord (now Gertrude Gaylord Bruce) are two of the beneficiaries of said trust, constitutes or constituted or is or ever was income of the petitioner and her said husband or of either of them as grantors or grantor under the provisions of Section 22(a) and/or Section 166 of the Revenue Acts of 1936 and 1938 and/or the same sections of the Internal Revenue Code or under any of said provisions, or otherwise, or at all.

(XII) The Commissioner erred in determining or holding that 2/7ths or any other part of the net income of said trust as adjusted for each of the years 1936 to 1939, inclusive, or for any of said years, or any net income of said trust should be included in the recomputation or computation of the petitioner's taxable net income for the years 1936 to 1939, inclusive, or for any of said years.

(XIII) The Commissioner erred in determining or [102] holding that for the purpose of computing the capital gains realized by said trust in the years 1936, 1937, 1938 and 1939 or in any of said years or the capital gains allegedly realized by the petitioner in the years 1936, 1937, 1938 and 1939 or any of said years from the sale of shares of the common capital stock of Marathon Paper Mills Company the statutory basis for computing gain or loss on each such sale was or is \$2.83542 per share instead of \$8.21 per share as stated in the income tax returns of said trust filed, and in determining the statutory basis for computing gain or loss on each such share to be any sum or amount whatsoever less than \$10.988.

(XIV) The Commissioner erred in determining or holding that for the purpose of determining the statutory basis for computing gain or loss on each or any such sale the fair market value of the 435 shares or any number of shares of the common stock of Menasha Printing and Carton Company received by said George S. Gaylord on or about August 15, 1917, or of any of said shares, in ex-

change for stock of Menasha Carton Company was or is \$100.00 per share or any other sum or amount whatsoever less than \$296.194 per share.

(XV) The Commissioner erred in determining or holding that while said George S. Gaylord's statutory basis for gain or loss upon the sale or other disposition of the bonds and stock of Marathon Paper Mills Company received by him on or about October 31, 1927, in exchange for 3357 shares of the common stock of Menasha Printing and Carton Company is the same as his basis in the shares given in that exchange, [103] such basis should be apportioned 53.967% to the bonds and 46.033% to the stock received in that exchange or should be apportioned at any other percentage than 54.21% to the bonds or than 45.79% to the stock received in that exchange.

(XVI) The Commisioner erred in determining (see Adjustments To Net Income Taxable Year Ended December 31, 1936, in said notice of deficiency) that there was or is additional income in the amount of \$12,601.08 or any other sum or amount whatsoever other than \$84.78.

(XVII) The Commisioner erred in determining (See under same heading in said notice) that there was or is income from trust in the amount of \$12,516.30 or any other sum or amount whatsoever.

(XVIII) The Commissioner erred in detremining (see Explanation of Adjustments for taxable year ended December 31, 1936, in said notice of deficiency) that the portion of the income of what

the Commissioner in his said notice of deficiency refers to as the "Gaylord Trust" held to be taxable to the petitioner was or is \$12,516.30 or any other sum or amount whatsoever, and in determining that any portion of the income of said Gaylord Trust is taxable to the petitioner.

(XIX) The Commissioner erred in determining (see said Explanation Of Adjustments in said notice of deficiency) that there was or is addition to income by increase in capital gain in amount of \$6,749.50 or any other sum or amount whatsoever and in determining that there was or is any addition to income by or because of any increase in capital gain [104] and in determining that there was any increase in capital gain in any sum or amount whatsoever.

(XX) The Commissioner erred in determining that the net income of the trust was or is \$43,-807.03 or any other sum or amount whatsoever in excess of \$37,357.53.

(XXI) The Commissioner erred in determining that 2/7ths or \$12,516.30 or any portion or amount of the net income of said trust was or is taxable to the petitioner.

(XXII) The Commissioner erred in determining (see Computation Of Tax Taxable Year Ended December 31, 1936, in said notice of deficiency) that there was or is net income adjusted or otherwise in the sum of \$13,878.16 or any other sum or amount whatsoever in excess of \$1,361.86 or a balance (sur-tax net income) in the sum of \$13,878.16 or any other sum or amount whatsoever in excess of \$1,-

361.86 or net income subject to normal tax in the sum of \$13,578.16 or any other sum or amount whatsoever in excess of \$1,225.67.

(XXIII) The Commissioner erred in determining (see said Computation Of Tax in said notice of deficiency) that there was or is a normal tax at 4% on \$13,578.16 or on any sum or amount whatsoever in excess of \$1,225.67, or a normal tax of \$543.13 or any other sum or amount whatsoever in excess of \$49.03, or that there was or is surtax on the sum of \$13,878.16 or on any other sum or amount whatsoever, or surtax in the amount of \$590.25 or any other sum or amount whatsoever, or that the correct or any income tax liability of the petitioner [105] on or with respect to her income for the calendar year 1936 was or is \$1,133.38 or any sum or amount whatsoever in excess of \$49.03, or that there is any deficiency of income tax in the amount of \$1,087.40 or any other sum or amount whatsoever in excess of \$3.05.

(XXIV) The Commissioner erred in determining (see Adjustments To Net Income Taxable Year Ended December 31, 1937, in said notice of deficiency) that there was or is additional income and unallowable deduction or additional income or unallowable deduction in the sum of \$13,120.08 or any other sum or amount whatsoever, or that there was or is income from trust taxable to petitioner in the sum of \$9,449.31 or any other sum or amount whatsoever, or that there was or is capital gain of \$3,385.99 or any other sum or amount whatsoever by way of additional income, or that there was or is

total net income or total net income adjusted of \$63,162.26 or any other sum or amount whatsoever in excess of \$50,326.96.

(XXV) The Commissioner erred in determining (see Explanation Of Adjustments for taxable year ended December 31, 1937, in said notice of deficiency) that \$9,449.32 is taxable to the petitioner as income of said Gaylord Trust and in determining that any income of said Gaylord Trust is taxable to the petitioner.

(XXVI) The Commissioner erred in determining (see said Explanation Of Adjustments on said notice of deficiency) that there was or is addition to income of said trust by increase in capital gain in the sum of \$2,576.80, or by any increase [106] in any capital gain or in any sum or amount whatsoever, and that the net income of trust as adjusted or otherwise was or is \$33,072.58 or any sum or amount whatsoever in excess of \$30,498.78.

(XXVII) The Commissioner erred in determining that 2/7ths or any part of the net income of said trust was or is taxable to the petitioner or that the sum of \$9,449.31 or any other sum or amount whatsoever of the net income of said trust as adjusted or of any net income of said trust or of any income of said trust was or is taxable to the petitioner.

(XXVIII) The Commissioner erred in determining (see Computation Of Tax Taxable Year Ended December 31, 1937, in said notice of deficiency) that the petitioner's net income for or with

respect to the calendar year 1937 as adjusted or otherwise was or is \$63,162.26 or any other sum or amount whatsoever in excess of \$50,326.96 or that the balance (surtax net income) was or is \$63,162.26 or any other sum or amount whatsoever in excess of \$50,326.96 or that the net income subject to normal tax was or is \$62,862.26 or any other sum or amount whatsoever in excess of \$50,026.96.

(XXIX) The Commissioner erred in determining (see said Computation Of Tax in said notice of deficiency) that petitioner was or is liable for normal tax at 4% on \$62,862.26 or any other sum or amount whatsoever in excess of \$50,026.96 or that the petitioner was or is liable for normal tax in the amount of \$2,514.49 or any other sum or amount whatsoever in excess of \$2,001.08 or that the petitioner is liable for surtax on \$63,162.26 or on any other sum or amount whatsoever [107] in excess of \$50,326.96 or that there was or is surtax in the amount of \$12,113.28 or any other sum or amount whatsoever in excess of \$7,701.68 or that the correct income tax liability was or is \$14,627.77 or any other sum or amount whatsoever in excess of \$9,702.76 or that there is deficiency of income tax in the amount of \$4,925.01 or any other sum or amount whatsoever or that there is any deficiency in any amount whatsoever for or with respect to any tax on any income of the petitioner for, in or with respect to the year 1937.

(XXX) The Commissioner erred in determining (see Adjustments To Net Income Taxable Year Ended December 31, 1938, in said notice of defi-

ciency) that there was or is additional income and unallowable deductions or additional income or any unallowable deduction or deductions in the total sum of \$18,779.91 or any other sum or amount whatsoever in excess of \$466.35 and in determining that there was or is income from trust taxable to petitioner in the sum of \$7,229.86 or any other sum or amount whatsoever or any income from any trust taxable to the petitioner, and in determining that there was or is any long-term capital gain in the sum of \$6,007.59 or any other sum or amount whatsoever taxable as additional income to the petitioner, and in determining that loss in the amount of \$5,-076.11 or any part thereof should be disallowed.

(XXXI) The Commissioner erred in determining that there was or is net income in the amount of \$11,042.79 or any other sum or amount whatsoever.

[108]

(XXXII) The Commissioner erred in determining (see Explanation Of Adjustments for Taxable Year Ended December 31, 1938, in said notice of deficiency) that \$7,229.86 or any part thereof or any other sum or amount whatsoever is taxable to the petitioner as income of said Gaylord Trust, and in determining that any income of said Gaylord Trust in or for the calendar year 1938 is taxable to the petitioner, and in determining that the deduction of \$15,899.86 for amount distributable to beneficiaries or any part of said sum or amount should be disallowed, and in determining that there was or is increase in long-term capital gain in the sum of

\$2,687.29 or any increase in any capital gain in any sum or amount whatsoever, and in determining that the loss of \$5,076.11 claimed by the petitioner or any part thereof should be disallowed, and in determining that the net income of trust as adjusted was or is \$25,304.53 or any other sum or amount whatsoever in excess of \$1,641.27.

(XXXIII) The Commissioner erred in determining that the petitioner was liable for 2/7ths or any proportion or part whatsoever of the income of said Gaylord Trust for, in or with respect to the calendar year 1938, or that 2/7ths or any proportion whatsoever of the income of said trust was or is the portion of the petitioner or that the petitioner was or is liable for \$7,229.86 net income of said trust or any part thereof or any income from said trust.

(XXXIV) The Commissioner erred in determining or holding (see said Explanation Of Adjustments in said notice of deficiency) that no deductible loss was sustained by [109] reason of the demolition of the building in Santa Monica, California, referred to in the return of income of said trust for the calendar year 1938 and referred to in said notice of deficiency and that no deductible loss in the sum of \$5,076.11 was sustained by said trust by reason of the demolition of said building in said year.

(XXXV) The Commissioner erred in determining (see said Explanation Of Adjustments in said notice of deficiency) that the amount of \$5,076.11 deducted in the petitioner's return of her income for the calendar year 1938 as representing her proportionate share of loss sustained in that year by

reason of the voluntary demolition of a building in Santa Monica, California, should be disallowed.

(XXXVI) The Commissioner erred in determining (see Computation Of Tax Taxable Year Ended December 31, 1938, in said notice of deficiency) that there was or is net income adjusted or otherwise in the sum of \$903.11 or any other sum or amount whatsoever or that there was or is a balance (surplus net income) in the sum of \$903.11 or any sum or amount whatsoever or that there was or is net income subject to normal tax in the sum of \$812.80 or any other sum or amount whatsoever.

(XXXVII) The Commissioner erred in determining (see said Computation Of Tax in said notice of deficiency) that there was or is normal tax at 4% on \$812.80 or on any other sum or amount whatsoever or normal tax in the sum of \$32.51 or any other sum or amount whatsoever or correct or other or any income tax liability in the sum of \$32.51 or in any [110] other sum or amount whatsoever or any deficiency of income tax in the amount of \$32.51 or any other sum or amount whatsoever.

(XXXVIII) The Commissioner erred in determining (see Adjustments To Net Income Taxable Year Ended December 31, 1939, in said notice of deficiency) that there was or is additional income and unallowable deductions or additional income or any unallowable deductions or deduction in the sum of \$10,780.59 or any sum or amount whatsoever in excess of \$835.78 or that there was or is income from trust taxable to the petitioner of \$7,201.17 or any

other sum or amount whatsoever or any income from any trust whatsoever taxable to the petitioner or that there was or is long-term capital gain of \$1,-343.64 or any other sum or amount whatsoever, or that storm loss of \$1,400.00 or any part thereof should be disallowed, or that there was or is net income adjusted or otherwise of \$26,492.30 or any other sum or amount whatsoever in excess of \$16,-547.49.

(XXXIX) The Commissioner erred in determining (see Explanation Of Adjustments for taxable year ended December 31, 1939, in said notice of deficiency) that \$7,201.17 of the income of said Gaylord Trust or any part of said sum or of any income of said trust was or is taxable to the petitioner, and in determining that deduction of \$22,-465.39 for amount distributable to beneficiaries or any part of said sum should be disallowed, and in determining that there was or is increase in long-term capital gain in amount of \$1,074.92 or any other sum or amount whatsoever or any in- [111] crease in any long-term capital gain whatsoever, and in determining that the net income of trust as adjusted was or is the sum of \$25,204.12 or any other sum or amount whatsoever in excess of \$1,663.81.

(XL) The Commissioner erred in determining (see said Explanation Of Adjustments in said notice of deficiency) that 2/7ths or any part or portion of the net or any income of said Gaylord Trust was or is taxable to the petitioner and in determining that \$7,201.17 or any part thereof was or is taxable to the petitioner.

(XLI) The Commissioner erred in determining (see said Explanation Of Adjustments in said notice of deficiency) that the deduction of \$2,650.00 taken and claimed by the petitioner in her return as representing her one-half of a loss of \$5,300.00 which resulted from destruction by storm of ornamental trees on residence property owned by the petitioner and her husband George S. Gaylord should be disallowed and in allowing only \$1,250.00 of said deduction of \$2,650.00 so taken and claimed by the petitioner.

(XLII) The Commissioner erred in determining (see Computation Of Tax Taxable Year Ended December 31, 1939, in said notice of deficiency) that net income adjusted or otherwise was or is \$26,-492.30 or any other sum or amount whatsoever in excess of \$16,547.49, and in determining that there was or is balance (surtax net income) of \$26,492.30 or any other sum or amount whatsoever in excess of \$16,547.49, and in determining that net income to normal tax was or [112] is \$26,192.30 or any other sum or amount whatsoever in excess of \$16,247.49.

(XLIII) The Commissioner erred in determining (see said Computation Of Tax in said notice of deficiency) that there was or is normal tax at 4% on \$26,192.30 or on any other sum or amount whatsoever in excess of \$16,247.49 or that there was or is normal tax of \$1,047.69 or any other sum or amount whatsoever in excess of \$649.90 or that there was or is surtax on \$26,492.30 or on any other sum or amount whatsoever in excess of \$16,547.49 or that

there was or is surtax of \$2,333.54 or surtax in any other sum or amount whatsoever in excess of \$732.62 or that there was or is correct or other or any income tax liability in the sum of \$3,381.23 or any other sum or amount whatsoever in excess of \$1,382.52 or that there was or is any deficiency of income tax in the sum of \$1,998.71 or any other sum or amount whatsoever.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The trust mentioned and referred to in said notice of deficiency and which is sometimes described in said notice as the Gaylord Trust was and is a trust originally created and provied for in that certain declaration of trust dated the 7th day of November, 1935, wherein said George S. Gaylord and his said wife, the petitioner, Gertrude H. Gaylord are named and referred to as trustees, which said declaration of trust was recorded September 28, 1937, in the office of the County Recorder of Los Angeles County, California, in Book 15288 at [113] Page 94 of Official Records of Said County. Said declaration of trust was also filed for record in the office of the Clerk of the County Court, Cameron County, Texas, on the 29th day of January, 1938, and recorded February 1, 1938, in Deed Record of said county, Volume 277 on pages 593-9, and was also filed for record in the office of the Clerk, County Court, Hidalgo County, Texas, March 18, 1938, and recorded March 24, 1938, in Volume X, pages 594-600, of the Miscellaneous Records of said County, and was also filed for record in the office of the

County Clerk, Potter County, Texas, June 22, 1938, and recorded June 23, 1938, in Deed Records of said county in Volume 282 on page 106, and was also filed for record in the office of the County Clerk, Jim Wells County, Texas, December 16, 1938, and recorded December 29, 1938, in Deed Records of said county in Volume 64 on pages 348-355. Attached hereto, marked Exhibit B, and hereby referred to and made a part hereof is a full and true copy of said declaration of trust and reference is hereby made to said declaration of trust for all particulars thereof and of the trust therein provided for. Said trust and declaration thereof are and have always been absolutely irrevocable and unchangeable by said George S. Gaylord and Gertrude H. Gaylord or by either of them or by any other person or party whomsoever, and there is not and has never been any power or revocation, change or modification of said trust or of any provision thereof reserved in any manner either in said declaration of trust or otherwise to said George S. Gaylord and Gertrude H. Gaylord or either of them or to any other person or party whomsoever. In connection with the creation of said trust and as a part of the same transaction said George S. Gaylord made and personally signed and executed under his oath a gift tax return for the calendar year 1935, on Form 709 Treasury Department Internal Revenue Service, which said return was so verified by him under date of February 3, 1936, before Alice F. Jackson, a notary public in and for the County of Los Angeles, State of California, and filed in the

office of the United States Collector of Internal Revenue at Los Angeles, California, on March 10, 1936. Said return included and covered said George S. Gaylord's contribution to said trust of the 5000 shares of the common capital stock of Marathon Paper Mills Company mentioned in said declaration of trust. In said return said George S. Gaylord declared that the gift represented by said contribution was made "By the creation of an irrevocable trust for the benefit of another" and there was at the same time filed in said office with said return and as a part thereof a copy of said declaration of trust. George S. Gaylord upon so filing his said return, with said copy of said declaration of trust, with said Collector of Internal Revenue, and at the same time the return was so filed, paid a gift tax in the amount of \$2,531.27 on gifts referred to in said return and which included the said George S. Gaylord's gift of said 5000 shares to said trust. Thereafter and under date of December 28, 1936, the said George S. Gaylord paid to said Collector an additional gift tax of \$90.05 assessed on said return. Attached hereto, marked Exhibit D, and hereby referred to and made a part hereof is a copy of said gift tax return. [115] Similarly in connection with the creation of said trust and as a part of the same transaction said Gertrude H. Gaylord made and personally signed and executed under her oath a gift tax return for the calendar year 1935 on Form 709 Treasury Department Internal Revenue Service, which said return was so verified by her under

date of September 3, 1936, before Alice F. Jackson, a notary public in and for the County of Los Angeles, State of California, and filed in the office of said Collector on March 10, 1936. Said return included and covered said Gertrude H. Gaylord's contribution to said trust of 2000 shares of the common capital stock of Marathon Paper Mills Company mentioned in said declaration of trust. In said return said Gertrude H. Gaylord similarly declared that the gift represented by said contribution was made "By the creation of an irrevocable trust for the benefit of another", and there was at the same time filed in said office with said return and as a part thereof a copy of said declaration of trust. Attached hereto, marked Exhibit E, and hereby referred to and made a part hereof is a copy of said gift tax return of said Gertrude H. Gaylord. The only trust to which said gift tax returns could or did refer was said trust so originally created by the hereinbefore mentioned declaration of trust. Long before any question, issue or controversy was raised by any tax authority respecting said trust said George S. Gaylord and the petitioner, said Gertrude H. Gaylord, his wife, upon advice of counsel and out of an abundance of caution, signed and executed a certain Declaration Being A Part Of A Certain Declaration Of Trust Dated November 7, 1935, which was dated November 7, 1935, and was acknowledged and sworn to by said George S. Gaylord and Gertrude H. Gaylord under date of March 27, 1940, before J. C. Humphreys, a notary public in and for the County of Los Angeles

in the State of California. Said Declaration Being A Part Of A Certain Declaration Of Trust Dated November 7, 1935, was recorded in the office of the County Recorder of Los Angeles County, California, on March 28, 1940, in Book 17245 at Page 350 of Official Records of said county. Attached hereto, marked Exhibit C, and hereby referred to and made a part hereof is a full and true copy of said Declaration Being A Part Of A Certain Declaration Of Trust Dated November 7, 1935. Said trust was created under and pursuant to a mutual understanding and agreement had between said George S. Gaylord and Gertrude H. Gaylord, his wife, prior to the execution of the above mentioned declaration of trust dated the 7th day of November, 1935, in and by which understanding and agreement it was understood and agreed by and between said George S. Gaylord and Gertrude H. Gaylord that if said George S. Gaylord would contribute to an irrevocable trust to be created and provided for the uses and purposes and upon the terms and conditions set forth in said declaration of trust said 5000 shares of the capital stock of Marathon Paper Mills Company owned by him as his separate property, such shares to be a part of the trust estate to be provided for in said trust, said Gertrude H. Gaylord would contribute to such trust as a part of such trust estate in trust for the same uses and purposes and upon [L17] the same terms and conditions the above mentioned 2000 shares of the common capital stock of Marathon Paper Mills Company owned by her as her sepa-

rate property and that if she would make such contribution of said 2000 shares so owned by her said George S. Gaylord would make such contribution of said 5000 shares so owned by him and that said trust was to be absolutely and at all times and under all circumstances irrevocable by any person or party whomsoever or whatsoever. Under and pursuant to said mutual understanding and agreement between said George S. Gaylord and Gertrude H. Gaylord said declaration of trust was executed by them and he contributed to said trust said 5000 shares and she contributed to said trust said 2000 shares. There was a good and valuable consideration passing from her to him for his execution of said declaration of trust and his contribution of said stock to said trust and his joining in said trust. There was likewise a good and valuable consideration passing from him to her for her execution of said declaration of trust and her contribution of her said stock to said trust and her joining in said trust. Said trust was not created without a valuable consideration passing to each of the trustors therein named. At the time said George S. Gaylord and Gertrude H. Gaylord executed said declaration of trust and at all times during the years 1936, 1937, 1938 and 1939 they had no knowledge of any law which would make or render or purported to make or render said trust in any manner or at any time revocable or the income thereof or any part thereof taxable to the trustors or either of them. At the time of the execution in [118] the year 1935 of said declaration of trust and prior

thereto and at all times since said execution of said declaration of trust it has always been the unaltered and firm mutual desire, understanding, agreement, assumption and belief of said trustors and trustees George S. Gaylord and Gertrude H. Gaylord that said trust was and is absolutely irrevocable by them or by either of them or by any person or party whomsoever or whatsoever at any time or in any manner whatsoever. At all times since said execution in 1935 of said declaration of trust said George S. Gaylord and Gertrude H. Gaylord have acted on said agreement, understanding, assumption and belief that said trust was so absolutely irrevocable. No question has ever been raised nor can legitimately be raised now as to the ever unchanged and firm intent at all times of said George S. Gaylord and Gertrude H. Gaylord to create pursuant to their mutual understanding and agreement an irrevocable trust on the terms, conditions and provisions set forth in said declaration of trust. The intent of said George S. Gaylord and Gertrude H. Gaylord that the trust created and provided for in said declaration of trust should forever be irrevocable preceded the creation of said trust, was present when said trust was formed and has at all times remained the same and unchanged.

(b) None of the income of or from the trust hereinbefore mentioned and referred to, either for any of the years 1936, 1937, 1938 or 1939, or otherwise, is or ever has been income of said George S. Gaylord or said Gertrude H. Gaylord, his wife, in his or

her individual or personal capacity, or [119] income in which he or she has or ever had any beneficial right, title, interest or estate whatsoever. The whole of the net income of and from said trust in or for said years 1936, 1937, 1938 and 1939 was the property of and belonged to and was taxable to Margaret Gaylord Ruppel and Gertrude Gaylord Bruce, the first named beneficiaries in and under said trust, in equal shares. There is no law or lawful or valid regulation whatsoever under or pursuant to which any of the aforementioned income can be considered or treated as income of said George S. Gaylord and said Gertrude H. Gaylord, his wife, or either of them, in their respective personal or individual capacities, or under or pursuant to which they are or either of them is or they or either of them can be made liable or charged for or assessed with any income tax on any of said income. Under the law all of said income for income tax purposes belongs to and is chargeable to the two first named beneficiaries of said trust, the above named Margaret Gaylord Ruppel and Gertrude Gaylord Bruce, in equal shares, and not to said George S. Gaylord and said Gertrude H. Gaylord, his wife, or to either of them. There is no provision for any accumulation of any of the income of said trust but all of the income of said trust must be paid, distributed or applied to or for the beneficiaries of said trust, either monthly, quarterly or semi-annually, but in any event annually. Neither said George S. Gaylord nor his wife Gertrude H.

Gaylord can at any time use or enjoy or be entitled to any of said income or participate therein. [120]

(c) Said two first named beneficiaries of said trust, Margaret Gaylord Ruppel and Gertrude Gaylord Bruce (named in said declaration of trust as Gertrude Gaylord), are the daughters of said George S. Gaylord and said Gertrude H. Gaylord, his wife. Said Margaret Gaylord Ruppel was born on November 10, 1904, and said Gertrude Gaylord Bruce was born May 31, 1916. Each of said beneficiaries has lawful issue now living. Said Margaret Gaylord Ruppel has two children now living, to-wit, a daughter Barbara Brunker, who is over the age of sixteen (16) years, she having been born October 14, 1925, and a son Robert Henry Brunker, who is over the age of thirteen (13) years, he having been born June 3, 1928. Said Gertrude Gaylord Bruce has one child living, to-wit, a daughter Ann Bruce, who is over the age of three (3) years, she having been born April 20, 1938. Said Margaret Gaylord Ruppel and Gertrude Gaylord Bruce now have and have had at all times since the inception of said trust in 1935 and each of them now has and at all said times has had present, existing and equal beneficial interests in said trust and the estate thereof and are the full owners of said trust, subject only in the event of non-survival to May 31, 1946 (when said Gertrude Gaylord Bruce will attain the age of thirty (30) years and the trust then in any case terminate) to being divested in favor of issue. Said Barbara Brunker, Robert

Henry Brunker and Ann Bruce are such issue now living.

(d) Each of said beneficiaries of said trust, Margaret Gaylord Ruppel and Gertrude Gaylord Bruce, rendered and filed [121] with said Collector of Internal Revenue, at Los Angeles, California, her individual income tax returns of her income for said years 1936, 1937, 1938 and 1939, respectively, in which returns she included all of her one-half of the net income of said trust for the appropriate year, and paid her individual income taxes on said income.

(e) Said declaration of trust shows on its face that it was intended to be operative under laws of jurisdictions other than California. Upon information and belief the petitioner alleges that under the law of every jurisdiction in the United States outside of the State of California the trust set forth in said declaration of trust in the form in which the same is set forth was at all times since the inception of said trust and is absolutely irrevocable. Said trust is also irrevocable under the laws of the State of California.

(f) During the year 1938 the trustees of said trust invested over \$94,000.00 of the principal or corpus of said trust in, and by way of purchase of, certain real property in the State of Texas for said trust and as a part of the estate thereof, which said real property ever since has been and is now owned and held by said George S. Gaylord and Gertrude H. Gaylord as trustees of said trust for the benefit of said trust and the beneficiaries thereof. In

connection with such investments and purchases and the operations of said trustees on behalf of said trust in the State of Texas said declaration of trust was recorded in the year 1938 in the offices of the clerks of the county courts of [122] Cameron, Hidalgo, Potter and Jim Wells Counties, Texas, respectively, as hereinbefore set forth. Included in the net income of and from said trust for the years 1938 and 1939 referred to in said notice of deficiency were and are the following net rents from said real property in said State of Texas, to-wit: In and for said year 1938 \$3,859.95 and in and for said year 1939 \$6,370.67. Upon information and belief the petitioner alleges that under the law of Texas said trust always was and is irrevocable and all of said income was and is wholly the property of said beneficiaries Margaret Gaylord Ruppel and Gertrude Gaylord Bruce, in equal shares, and that neither said George S. Gaylord nor his said wife Gertrude Gaylord is entitled to have or enjoy any of said income.

(g) All of the 7000 shares of the capital stock of Marathon Paper Mills Company, a Wisconsin corporation, mentioned in said declaration of trust were sold and delivered by said trustees in Chicago, Illinois, and/or in the State of New York. Upon information and belief the petitioner alleges that said trust always was and is irrevocable in the States of Illinois and New York.

(h) All of the cash funds of said trust in the years 1936, 1937 and 1938 were kept on deposit in

the names of said George S. Gaylord and Gertrude H. Gaylord, as trustees under Declaration of Trust dated November 7, 1935, with Harris Trust and Savings Bank in Chicago, Illinois, and in the years 1939, 1940 and 1941 all of the bank accounts of said trustees, as trustees of said trust, were kept with said Harris Trust and [123] Savings Bank in Chicago, Illinois, and with Bankers Trust Company, of 16 Wall Street in the City of New York, in the State of New York.

(i) Said 7000 shares of the capital stock of Marathon Paper Mills Company were acquired with some bonds in a non-taxable exchange October 31, 1927, in which exchange said George S. Gaylord exchanged 3357 shares of the stock of Menasha Printing and Carton Company (a corporation merged or consolidated with Marathon Paper Mills Company October 31, 1927) for 6728 shares of common stock and \$1,038,000.00 (face value) in bonds of Marathon Paper Mills Company. In determining the basis for said 3357 shares of Menasha Printing and Carton Company stock used as the basis for the stock and bonds so acquired in Marathon Paper Mills Company the Commissioner erred by disregarding two important transactions, hereinafter mentioned, affecting the basis of this stock. Commencing in 1928 said George S. Gaylord sold some of such bonds so acquired, using a basis of \$251.99 for each bond in reporting such sales transactions in his subsequent returns of income for each of the years in which such sales were

made, that is, 1928, 1929, 1930, 1931, 1932, 1933, 1934 and 1935. This basis was accepted by the Internal Revenue Service upon the examination of said George S. Gaylord's income tax return of his income for the year 1928, in which year the first sales of such bonds were made by him, and said basis was used thereafter by him in all the aforementioned subsequent returns in reporting sales of such bonds. The [124] basis for the stock so acquired with such bonds was also determined and shown in the computation of the basis for such bonds and has been used by said George S. Gaylord in all income tax returns reporting sales of that stock, that is, in all income tax returns of income for the years 1935 to 1939, inclusive, the last of such stock having been sold in the last mentioned year, that is, in 1939. Attached hereto, marked Exhibit F, and hereby referred to and made a part hereof is a copy (substantially) of the schedule which was attached to all of said income tax returns and used in connection therewith and referred to therein, in which the aforesaid bases were set forth. These bases so used by said George S. Gaylord in all income tax returns made by him and also the bases determined by the Internal Revenue Service for the Marathon Paper Mills Company stock are in error, principally for the reason that two important taxable exchanges were not considered by either said George S. Gaylord or the Internal Revenue Service in arriving at the bases of value of such stocks and bonds, said George S. Gaylord having failed to consider said

two exchanges through inadvertence. These two exchanges are as follows:

(1) On or about July 1, 1917, in the merger or consolidation of Menasha Carton Company and Menasha Printing Company to form Menasha Printing and Carton Company, said George S. Gaylord surrendered 337 shares of stock owned by him in Menasha Carton Company and gave his note for \$152,161.11 for 435 shares of the common stock and 190 [125] shares of the preferred stock of the new corporation, Menasha Printing and Carton Company. Upon completion of this consolidation or merger he did not own an interest in the new company proportionate to his interest in the merged or consolidated company prior to such merger or consolidation. The basis upon which the exchange of stock in the old corporations for stock in the new corporation was made was upon the actual value of the assets of each of the old companies at the time of the merger or consolidation. The par or stated value of the stock in the new corporation was based substantially upon the par or stated value of the stock of the old companies plus the accumulated earnings to the date of the consolidation or merger.

(2) On or about August 24, 1927, said George S. Gaylord acquired 352 shares of Menasha Printing and Carton Company from his brother C. W. Gaylord in exchange for 432 shares of stock of Robert Gaylord, Inc. Said George S. Gaylord previously had given to his brother C. W. Gaylord on or about October 5, 1925, 350 shares of stock of

Menasha Printing and Carton Company in exchange for the same 432 shares of stock in Robert Gaylord, Inc., so returned to C. W. Gaylord on or about August 24, 1927. These exchanges were taxable, although through inadvertence not considered so by said George S. Gaylord at the times involved, and the basis for the 352 shares of stock acquired by him affects the basis of the Marathon Paper Mills Company stock and its value is determined by the value placed on [126] stock of Menasha Printing and Carton Company, a party to the tax-free organization completed in October, 1927. This value is determined as follows: Said George S. Gaylord received for 3357 shares of Menasha Printing and Carton Company stock, which included the 352 shares received on or about August 24, 1927, from his brother, the following securities:

1038 5½% bonds	\$ 1,038,000.00
6728 shares common stock valued at 130.30	
per share	876,658.40

	\$ 1,914,658.40

337/3357 of this value \$1,914,658.40 is \$200,762.51, the value of these 352 shares of stock.

Attached hereto, marked Exhibit G, and hereby referred to and made a part hereof is a copy (substantially) of a memorandum which was submitted to the Internal Revenue Service showing the basis of the stock acquired by said George S. Gaylord in Menasha Printing and Carton Company, based on the earnings in 1917 of the Menasha Carton Com-

pany. Attached hereto, marked Exhibit H, and hereby referred to and made a part hereof, is a schedule showing the computation of the basis of Marathon Paper Mills stock based upon the data set forth in the hereinbefore referred to Exhibit F and Exhibit G.

(j) For the purpose of computing the capital gain realized in the years 1936, 1937, 1938 and 1939 from the sale of shares of the common capital stock of Marathon Paper Mills Company belonging to said trust the statutory basis for computing gain or loss on each such sale was and [127] is \$8.21 per share as stated in the income tax returns filed for said year and not \$2.83542 per share or any sum or amount less than \$8.21 per share.

(k) In March, 1938, said George S. Gaylord, in his individual and personal capacity, and the petitioner, his said wife Gertrude H. Gaylord, in her individual and personal capacity, and the herein-before mentioned trust by its trustees George S. Gaylord and Gertrude H. Gaylord purchased each an undivided one-third interest in business property situate in Santa Monica, California, consisting of land improved at the time of said purchase with a storerooms building then occupied by three different tenants in several tenancies. In the latter part of 1938 one of these tenants, requiring additional space, requested the owners to build an addition to the building and to do such remodeling as was necessary to meet his requirements. A contractor was engaged to give an estimate on the cost of such work and it was found that considerable ex-

penditure would have to be made to remodel the old building and the contractor suggested demolishing the old building and erecting a new building and gave said owners his estimates for this work. The latter then consulted brokers through whom the property was purchased and were informed as to the rental value of the proposed improvement and as to the prospect of obtaining new tenants if the then tenants could not be retained. It was at this time, in 1938, that the petitioner and her co-owners decided to demolish the building. [128] At the time the premises above mentioned were acquired by the petitioner and her co-owners they had no intention of demolishing the building then on said land.

Wherefore, the petitioner prays that this Board may hear this proceeding and redetermine the deficiency set forth by the Commissioner of Internal Revenue hereinbefore referred to and determine that there is no such deficiency of \$8,043.63 and that there is no deficiency in any sum or amount whatsoever in or with respect to the petitioner's income tax liability for the taxable years 1936 to 1939, in-

clusive, or any of said years, and for such other relief as may be proper in the premises.

GERTRUDE H. GAYLORD

Post Office Address: 639 Rosemont Avenue, Pasadena, California.

THOMAS A. J. DOCKWEILER
whose post office address is 1035 T. N. Van Nuys
Building, 210 West Seventh Street, Los Angeles, California.

JAMES W. BONTEMS

whose post office address is 215 West Sixth Street,
Los Angeles, California.

Attorneys for said petitioner.

[129]

State of California,
County of Monterey—ss.

Gertrude H. Gaylord, being duly sworn, says that she is the petitioner above named; that she has read the foregoing petition and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that she believes those to be true.

GERTRUDE H. GAYLORD

Subscribed and sworn to before me this 19th day of November, 1941.

(Notarial Seal) R. McKEVER, JR.

Notary Public in and for said County and State.

My Commission Expires Sept. 22, 1942. [130]

EXHIBIT A

(Copy)

SN-IT-1

Treasury Department
Internal Revenue Service
12th Floor,
U. S. Post Office and Court House,
Los Angeles, California
Sep. 17, 1941.

Office of
Internal Revenue Agent in Charge
Los Angeles Division.
LA :IT :90D :PB

Mrs. Gertrude H. Gaylord,
639 Rosemont Avenue,
Pasadena, California.

Madam:

You are advised that the determination of your income tax liability for the taxable years 1936 to 1939, inclusive, discloses a deficiency of \$8,043.63 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for the redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward

Exhibit A—(Continued)

it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.

By (Signed) GEORGE D. MARTIN

Internal Revenue Agent in
Charge.

Enclosures:

Statement.

Form of waiver.

PB:fpc [131]

Exhibit A—(Continued)

STATEMENT

LA:IT:90D:PB

Mrs. Gertrude H. Gaylord,
 639 Rosemont Avenue,
 Pasadena, California.

Tax Liability for the Taxable Years Ended
 December 31, 1936
 December 31, 1937,
 December 31, 1938,
 and
 December 31, 1939.

Income Tax

Year	Liability	Assessed	Deficiency
1936	\$ 1,133.38	\$ 45.98	\$ 1,087.40
1937	14,627.77	9,702.76	4,925.01
1938	32.51	0.00	32.51
1939	3,381.23	1,382.52	1,998.71
<hr/> Totals	<hr/> \$19,174.89	<hr/> \$11,131.26	<hr/> \$8,043.63

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated December 21, 1940, to your protests dated January 27 and April 21, 1941, and to the statements made at the conferences held on March 31, May 1 and July 18, 1941.

The net income as adjusted for the taxable years 1936, 1937, 1938 and 1939, of the trust created by declaration of trust executed November 7, 1935 by George S. Gaylord and yourself in which you and your husband are named as grantors and trustees and your two daughters, Margaret Gaylord Ruppel

Exhibit A—(Continued)

and Gertrude Gaylord are named as beneficiaries, is held to constitute income to the grantors under the provisions of section 22(a) and/or section 166 of the Revenue Acts of 1936 and 1938 and/or the same sections of the Internal Revenue Code. Inasmuch as two-sevenths of the total value of the property transferred to the trust was contributed by you, that proportion of the net income of the trust as adjusted for each of the years 1936 to 1939, inclusive, has been included in the recomputation of your taxable net income for those years. [132]

For the purpose of computing the capital gains realized by you and the Gaylord Trust in the years 1936, 1937, 1938 and 1939 from the sale of shares of the common capital stock of Marathon Paper Mills Company, the statutory basis for computing gain or loss on each such sale has been determined to be \$2.83542 per share, instead of \$8.21 per share as stated in the income tax returns filed. For the purpose of that determination the fair market value of 435 shares of common stock of Menasha Printing and Carton Company received by George S. Gaylord on or about August 15, 1917 in exchange for stock of Menasha Carton Company is held to be \$100.00 per share. It is held further that George S. Gaylord's basis for gain or loss upon the sale or other disposition of the bonds and stock of Marathon Paper Mills Company received by him on or about October 31, 1927 in exchange for 3357 shares of the common stock of Menasha Printing and Carton Company, is the same as his basis in the shares

Exhibit A—(Continued)

given in that exchange, and that such basis should be apportioned 53.967% to the bonds and 46.033% to the stock received in that exchange. Your basis for gain or loss upon the sale or other disposition of the 4,000 shares of the capital stock of Marathon Paper Mills Company received by you as a gift from George S. Gaylord on or about February 9, 1932 is the same as that of the donor, as provided in section 113(a)(2) of the Internal Revenue Acts of 1936 and 1938 and of the Internal Revenue Code.

A copy of this letter and statement has been mailed to your representative, Mr. James W. Bon tems, 215 West 6th Street, Los Angeles, California, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau. [133]

ADJUSTMENTS TO NET INCOME

Taxable Year Ended December 31, 1936

Net income as disclosed by return.....	\$ 1,277.08
Additional income and unallowable deduction:	
(a) Income from trust	\$12,516.30
(b) Depreciation disallowed	84.78
	12,601.08
Net income adjusted	13,878.16

Explanation of Adjustments

(a) The portion of the income of the Gaylord Trust held to be taxable to you, as stated above, has been determined to be \$12,516.30, as follows:

Exhibit A—(Continued)

Net income reported in trust return, form 1041.....	\$37,057.53
Addition to income:	
Increase in capital gain	6,749.50

Net income of trust as adjusted.....	\$43,807.03
Your portion, 2/7	\$12,516.30

The increase in capital gain in the amount of \$6,749.50 is due to the above noted decrease in basis of Marathon Paper Mills Company common stock from \$8.21 per share to \$2.83542 per share, resulting in a difference in realized gain, when applied to the 4,000 shares of the mentioned stock sold by the trust, of \$21,498.32, of which 30%, or \$6,449.50, is taken into account under the provisions of section 117(a) of the Revenue Act of 1936; the increase is due further to the correction of a mathematical error of \$300.00 made in the trust return in applying the 30% limitation to realized gain. [134]

(b) The amount of depreciation allowable on brick veneer house is determined to be \$815.22, representing depreciation at the rate of 2½% per annum on \$32,608.80. Since you claimed depreciation on this property in the amount of \$900.00, there is disallowed the amount of \$84.78.

COMPUTATION OF TAX

Taxable Year Ended December 31, 1936

Net income adjusted	\$13,878.16
Less: Personal exemption (claimed by husband).....	None

Balance (surtax net income).....	\$13,878.16
Less: Earned income credit	300.00

Net income subject to normal tax.....	\$13,578.16

Exhibit A—(Continued)

Normal tax at 4% on \$13,578.16.....	\$ 543.13
Surtax on \$13,878.16.....	590.25
Correct income tax liability	\$ 1,133.38
Income tax assessed:	
Original, account No. 801666	45.98
Deficiency of income tax	\$ 1,087.40

ADJUSTMENTS TO NET INCOME

Taxable Year Ended December 31, 1937

Net income as disclosed by return.....	\$50,042.18
Additional income and unallowable deduction:	
(a) Income from trust	\$ 9,449.31
(b) Capital gain	3,385.99
(c) Dividends	200.00
(d) Depreciation disallowed	84.78 13,120.08
Net income adjusted	\$63,162.26

[135]

Explanation of Adjustments

(a) The portion of the income of the Gaylord Trust held to be taxable to you, as stated above, has been determined to be \$9,449.31, as follows:

Net income reported in trust return, form 1041.....	\$30,495.78
Addition to income:	
Increase in capital gain	2,576.80
Net income of trust as adjusted.....	\$33,072.58
Your portion, 2/7	\$ 9,449.31

The increase in capital gain in the amount of \$2,576.80 is due to the above noted decrease in basis of Marathon Paper Mills Company common stock from \$8.21 per share to \$2.83542 per share, resulting in a difference in realized gain, when applied to

Exhibit A—(Continued)

the 1,600 shares of the mentioned stock sold by the trust, of \$8,599.33, of which 30%, or \$2,579.80, is taken into account under the provisions of section 117(a) of the Revenue Act of 1936, and due further to the correction of a mathematical error of \$3.00 made in the trust return.

(b) This increase in the amount of capital gain reported in your return is due to the above noted decrease in basis of Marathon Paper Mills Company common stock from \$8.21 per share to \$2.83542 per share, resulting in a difference in realized gain, when applied to the 2,100 shares of the mentioned stock sold by you, of \$11,286.62, of which 30%, or \$3,385.99, is taken into account under the provisions of section 117(a) of the Revenue Act of 1936. [136]

(c) The following dividends received by you in the taxable year are not included in your return:

Barnsdall Oil Company	\$100.00
Cutler Hammer, Inc. (\$200.00 received, \$100.00 included in your return)	100.00
Total	\$200.00

(d) This disallowance of depreciation is explained under adjustment (b) for the year 1936.

COMPUTATION OF TAX

Taxable Year Ended December 31, 1937

Net income adjusted	\$63,162.26
Less: Personal exemption (claimed by husband)	None
Balance (surtax net income)	\$63,162.26
Less: Earned income credit	300.00
Net income subject to normal tax.....	\$62,862.26

Exhibit A—(Continued)

Normal tax at 4% on \$62,862.26.....	\$ 2,514.49
Surtax on \$63,162.26.....	12,113.28
Correct income tax liability	\$14,627.77
Income tax assessed:	
Original, account No. 809620	9,702.76
Deficiency of income tax	\$ 4,925.01

[137]

ADJUSTMENTS TO NET INCOME

Taxable Year Ended December 31, 1938

Net income (loss) as disclosed by return.....	(\$ 7,737.12)
Additional income and unallowable deductions:	
(a) Income from trust	\$ 7,229.86
(b) Net long-term capital loss adjusted	6,007.59
(c) Depreciation disallowed	466.35
(d) Loss disallowed	5,076.11
	18,779.91
Total	\$11,042.79
Additional deductions:	
(e) Expenses, rental property	\$ 130.88
(f) Non-capital loss	10,008.80
	10,139.68
Net income adjusted	\$ 903.11

Explanation of Adjustments

(a) The portion of the income of the Gaylord Trust held to be taxable to you, as stated above, has been determined to be \$7,229.86, as follows:

Net income reported in trust return, form 1041.....\$ 0.00

Additions to income:

1. Deduction for amount distributable to beneficiaries disallowed.....\$15,899.86
 2. Increase in long-term capital gain.... 2,687.29
 3. Adjustment of net income from rents
- 1,641.27

Exhibit A—(Continued)

4. Loss disallowed	5,076.14	25,304.53
Net income of trust as adjusted.....		\$25,304.35
Your portion, 2/7	\$ 7,229.86	

[138]

1. For the purpose of determining the amount of income derived by the trust the deduction claimed for the amount distributable to beneficiaries is disallowed.

2. The increase in long-term capital gain in the amount of \$2,687.29 is due to the above noted decrease in basis of Marathon Paper Mills Company common stock from \$8.21 per share to \$2.83542 per share, resulting in a difference in realized gain, when applied to the 1,000 shares of the mentioned stock sold by the trust, of \$5,374.58, of which 50%, or \$2,687.29, is taken into account, under the provisions of section 117(b) of the Revenue Act of 1938.

3. This adjustment results from the determination of rental net income in the amount of \$6,282.91, whereas the amount reported in the trust return is \$4,641.64, a difference of \$1,641.27. The amount of \$6,282.91 has been determined as follows:

Property	Rent Received	Depreciation	Other Expense	Net Profit
Alhambra	\$ 697.41	\$ 64.90	\$ 35.10	\$ 597.41
Amarillo	965.01	88.89	64.75	811.37
McAllen	1,893.54	181.82	127.26	1,584.46
Santa Monica	1,856.58	.....	31.03	1,825.55
Harlingen	1,764.12	300.00	.....	1,464.12
Total	\$7,176.66	\$ 635.61	\$ 258.14	\$6,282.91

Exhibit A—(Continued)

4. The amount of \$5,076.11 deducted in the return filed by the trust as representing its proportionate share of loss sustained in the year 1938 by reason of the voluntary demolition of a building in Santa Monica, California, is disallowed. It appears that the building in question was situated on land acquired in March, 1938 one-third each in the names of George S. Gaylord, Gertrude H. Gaylord and the Gaylord Trust and that it was razed early in January 1939 to make way for the erection of a new building. It is held that no deductible loss was sustained by reason of the demolition of the building in question. See Article 23(e)-2 of Regulations 101. [139]

(b) This decrease in the amount of net long-term capital loss reported in your return is due to the following adjustments:

	Gain (Loss) Reported	Gain (Loss) Corrected	Adjustment
1. Marathon Paper Mills Company common stock	\$ 7,182.00	\$8,256.92	\$1,074.92
2. House and lot	(4,756.30)	176.37	4,932.67
Totals	<u>\$ 2,425.70</u>	<u>\$8,433.29</u>	<u>\$6,007.59</u>

1. This adjustment in the amount of long-term capital gain is due to the above noted decrease in basis of Marathon Paper Mills Company common stock from \$8.21 per share to \$2.83542 per share, resulting in a difference in realized gain, when applied to the 400 shares of the mentioned stock sold by you, of \$2,149.83, of which 50%, or \$1,074.92, is taken into account under the provisions of section 117(b) of the Revenue Act of 1938.

Exhibit A—(Continued)

2. This adjustment is due to a reclassification of loss as between capital and non-capital gain or loss. In your return you reported a loss sustained of \$9,512.60 from the sale of a house and lot, of which you took into account 50%, or \$4,756.30 as long-term capital loss. It is determined that the amount of depreciation on the house previously allowed or allowable is \$5,706.54, representing depreciation in the amount of \$815.22 per annum (as stated under adjustment (b) for the year 1936) for 7 years. In your return you show depreciation previously allowed or allowable on the house in the amount of \$5,850.00, a difference of \$143.46. This difference of \$143.46 results in an increase in the amount of loss sustained from \$9,512.60 to \$9,656.06. Since under the provisions of section 117 of the Revenue Act of 1938 the land is a capital asset, the gain or loss from the sale of which is taken into account to the extent of only 50%, and the house is a non-capital asset, the gain or loss from the sale of which is taken into account to the extent of 100%, the revised amount of loss is apportioned, and taken into account, as follows: [140]

	Amount of Gain (Loss) Realized	Taken into Account
From sale of land.....	\$ 352.74	\$ 176.37
From sale of house.....	(10,008.80)	(10,008.80)
Total realized.....	(9,656.06)	

In this adjustment (b) the above amount of gain, \$176.37, is substituted for the \$4,756.30 loss claimed

Exhibit A—(Continued)

in your return, and under adjustment (f) there is allowed the loss of \$10,008.80.

(c) This disallowance of depreciation is due to the following adjustments:

Property	Depreciation		
	Claimed	Allowed	Disallowed
1. Brick and tile—			
Harlingen	\$ 600.00	\$ 300.00	\$ 300.00
2. Brick—Amarillo	200.00	88.89	111.11
3. Stucco and steel—			
Alhambra	77.75	64.90	12.85
4. House sold in			
1938—Neenah	450.00	407.61	42.39
Totals	<hr/> \$1,327.75	<hr/> \$ 861.40	<hr/> \$ 466.35

1. The allowable depreciation is determined upon the basis of \$12,000.00 cost and depreciation at the rate of $2\frac{1}{2}\%$ per annum.

2. This property was acquired during the taxable year at a cost subject to depreciation of \$3,200.00, having an estimated remaining life of 18 years. Depreciation is allowable for 6 months of this taxable year. [141]

3. This property was acquired during the taxable year at a cost subject to depreciation of \$7,787.69, having an estimated remaining life of 30 years. Depreciation is allowable for 3 months of this taxable year.

4. Depreciation is allowable for 6 months of this taxable year on this property, upon the basis stated in adjustment (b) for the year 1936 (one-half of \$815.22).

Exhibit A—(Continued)

- (d) The amount of \$5,076.11 deducted in your return as representing your proportionate share of loss sustained in the year 1938 by reason of the voluntary demolition of a building in Santa Monica, California, is disallowed for the reason stated under item 4 of adjustment (a) for this year.
- (e) Expenses deductible against rental income in the amount of \$130.88 are not claimed in your return.
- (f) This adjustment is explained under adjustment (b) for this year.

COMPUTATION OF TAX

Taxable Year Ended December 31, 1938

Net income adjusted	\$ 903.11
Less: Personal exemption (claimed by husband).....	None
Balance (surtax net income).....	\$ 903.11
Less: Earned income credit (10% of \$903.11).....	90.31
Net income subject to normal tax	\$ 812.80
Normal tax at 4% on \$812.80.....	\$ 32.51
Surtax on \$903.11.....	0.00
Correct income tax liability	\$ 32.51
Income tax assessed:	
Original, account No. 656040	None
Deficiency of income tax	\$ 32.51

[142]

Exhibit A—(Continued)

ADJUSTMENTS TO NET INCOME

Taxable Year Ended December 31, 1939

Net income as disclosed by return	\$15,711.71
Additional income and unallowable deductions:	
(a) Income from trust	\$7,201.17
(b) Long-term capital gain	1,343.64
(c) Depreciation disallowed	835.78
(d) Storm loss disallowed	1,400.00
	10,780.59
Net income adjusted	\$26,492.30

Explanation of Adjustments

(a) The portion of the income of the Gaylord Trust held to be taxable to you, as stated above, has been determined to be \$7,201.17, as follows:

Net income reported in trust return, form 1041.....	\$ 0.00
Additions to income:	
1. Deduction for amount distributable to beneficiaries	\$22,465.39
2. Increase in long-term capital gain....	1,074.92
3. Depreciation disallowed	1,663.81
	25,204.12
Net income of trust as adjusted.....	\$25,204.12
Your portion, 2/7	\$ 7,201.17

1. For the purpose of determining the amount of income derived by the trust the deduction claimed for amount distributable to beneficiaries is disallowed. [143]

2. The increase in long-term capital gain in the amount of \$1,074.92 is due to the above noted decrease in the basis of Marathon Paper Mills Company common stock from \$8.21 per share to \$2.83542 per share, resulting in a difference in realized gain,

Exhibit A—(Continued)

when applied to the 400 shares of the mentioned stock sold by the trust, of \$2,149.83, of which 50%, or \$1,074.92, is taken into account under the provisions of section 117(b) of the Internal Revenue Code.

3. This adjustment results from the determination of allowable depreciation in the amount of \$2,001.29, whereas the amount claimed in the trust return is \$3,665.10, a difference of \$1,663.81. The amount of \$2,001.29 has been determined as follows:

Property	Date Acquired	Cost	Est. Rem. Life	Allowable Depreciation
Alhambra	1938	\$ 7,787.69	30	\$ 259.59
Amarillo	1938	3,200.00	18	177.77
Alice	1938	21,000.00	40	525.00
Harlingen	1937	12,000.00	40	300.00
McAllen	1938	8,000.00	22	363.64
Santa Monica	1939	11,258.60	30	375.29
		Total.....		\$2,001.29

(b) This increase in the amount of long-term capital gain reported in your return is due to the above noted decrease in basis of Marathon Paper Mills Company common stock from \$8.21 per share to \$2.83542 per share, resulting in a difference in realized gain, when applied to the 500 shares of the mentioned stock sold by you, of \$2,687.29, of which 50%, or \$1,343.64, is taken into account under the provisions of section 117(b) of the Internal Revenue Code. [144]

(c) This disallowance of depreciation is due to the following adjustments:

Exhibit A—(Continued)

Depreciation

Property	Claimed	Allowed	Disallowed
1. Stucco and steel— Alhambra	\$ 385.50	\$ 259.59	\$ 125.91
2. Brick—Amarillo	400.00	177.77	222.23
3. Brick and tile— Harlingen	600.00	300.00	300.00
4. Stucco and steel— Santa Monica	562.93	375.29	187.64
Totals	\$1,948.43	\$1,112.65	\$ 835.78

1. The basis of the determination of the amount allowable is explained under item 3 of adjustment (c) for the preceding taxable year.

2. The basis of the determination of the amount allowable is explained under item 2 of adjustment (c) for the preceding taxable year.

3. The determination of the amount allowable is explained under item 1 of adjustment (c) for the preceding taxable year.

4. This property was acquired during the taxable year at a cost subject to depreciation of \$11,258.60, having an estimated remaining life of 30 years.

(d) In your return you took a deduction of \$2,650.00 as representing your one-half of a loss of \$5,300.00 claimed to have resulted from the destruction by storm of ornamental trees on the personal residence property owned by you and your husband, George S. Gaylord. It is held that the total amount of the loss as sustained did not exceed \$2,500.00 and one-half of that amount, or \$1,250.00, is allowed in lieu of the \$2,650.00 deducted in the return. [145]

Exhibit A—(Continued)

COMPUTATION OF TAX

Taxable Year Ended December 31, 1939

Net income adjusted	\$26,492.30
Less: Personal exemption (claimed by husband).....	None
Balance (surtax net income).....	\$26,492.30
Less: Earned income credit	300.00
Net income subject to normal tax.....	\$26,192.30
Normal tax at 4% on \$26,192.30.....	\$1,047.69
Surtax on \$26,492.30.....	2,333.54
Correct income tax liability	\$ 3,381.23
Income tax assessed:	
Original account No. 852593	1,382.52
Deficiency of income tax	\$ 1,998.71

[146]

EXHIBIT B

DECLARATION OF TRUST

Know All Men By These Presents:

That the undersigned, George S. Gaylord and Gertrude H. Gaylord, his wife, of the City of Pasadena, in the County of Los Angeles, State of California (who, though more than one, are also hereinafter called "trustee"), do hereby certify and declare that they hold and shall and will hold the following described personal property, to-wit: seven thousand (7,000) shares of the common capital stock of Marathon Paper Mills Company, a Wisconsin corporation, of the par value of Twenty-

Exhibit B—(Continued)

five Dollars (\$25.00) per share, and any and all proceeds thereof, In Trust, Nevertheless, for the following uses and purposes and upon the following terms and conditions, to-wit:

ARTICLE I

The trustee shall, during the existence of this trust, in all respects as said George S. Gaylord (who was the former owner of five thousand (5,000) of said shares) or said Gertrude H. Gaylord (who was the former owner of two thousand (2,000) of said shares) could if he or she had absolute and unlimited ownership, possession, management, control and disposition of said shares and any and all proceeds thereof, take charge of and possess, manage and control all of said shares and all principal proceeds thereof and any and all investments and reinvest- [147] ments thereof and any and all property substituted for any of said stock, proceeds, investments and/or reinvestments (all of which said stock, the principal proceeds thereof, investments and reinvestments and property are hereinafter referred to as the "trust estate") and receive and collect the rents, issues, profits, interest, dividends and income of the trust estate. The trustee shall loan, reloan, invest, reinvest, and keep invested each and every part of the trust estate in such manner as the trustee may deem advisable, and for and/or in connection with any and/or all of the aforesaid purposes and/or any purpose of this trust shall sell, exchange, rent, lease, mortgage,

Exhibit B—(Continued)

pledge, hypothecate, convey, transfer, assign and dispose of the trust estate, real, personal and/or mixed, or any part thereof or any interest therein, at any time and from time to time and upon such terms and for such prices or considerations as the trustee may deem advisable. Without in any manner limiting any power or authority of the trustee as set forth in this instrument, the authority and power of the trustee hereinbefore set forth in this Article I shall include and be deemed to include the following authorizations, powers and rights in the trustee, to be exercised in the sole judgment and discretion of the trustee, to-wit: To hold, maintain, operate and/or continue, at the risk of the trust estate and as long as the trustee may deem advisable, any and all property and/or business which the trustee may receive [148] hereunder, whether or not the same are or is permissible by law as investment for trust funds, or the trustee may sell, exchange or dispose of the same. To partition, divide and/or subdivide. To rent and/or lease for a term of ninety-nine (99) years or for any lesser term or for any term which shall or may last or extend for any term beyond or after the termination of this trust, and to such lessee or lessees and for such rents and upon such covenants, agreements, provisions, conditions and stipulations as the trustee may determine. To improve the property of the trust estate and/or repair and/or keep in good order any and all improvements on the property of the trust estate and to remove, substitute, alter and/or repair any

Exhibit B—(Continued)

improvement on any such property and/or add any improvement thereto. To borrow from time to time such sum or sums of money as the trustee may deem best to meet any cost or expense of the administration or execution of this trust if the trustee has not sufficient funds available of the trust estate to meet any such cost and/or expense. To fix the rate of interest and other terms of any such loan and to pay such interest on any such loan and to secure any such loan by mortgage, deed of trust, pledge or other lien upon or transfer of real, personal and/or mixed property of the trust estate or any part thereof. To loan the trustee's own funds to this trust at prevailing rates of interest, if such loan be necessary to meet any cost and/or expense of the administration and/or execution of this [149] trust and the trustee has not sufficient funds available of the trust estate therefor, any such loan with such interest thereon to be a first lien on the whole of the trust estate and the gross income therefrom and to be first repaid out of the gross income and/or principal of the trust estate. To in such manner and upon such terms as to the trustee shall seem best make all compromises and/or settlements which the trustee may deem necessary or proper as to any claim, question, matter or thing which may arise during or in the execution of this trust. To have respecting bonds, shares of corporate stock and other securities, whether similar or dissimilar, all the rights, powers and privileges of an owner, including though with-

Exhibit B—(Continued)

out limiting the foregoing, holding securities in the trustee's own name or otherwise, voting, giving proxies, payment of calls, assessments and other sums deemed by the trustee expedient for the protection of the interests of the trust estate, exchanging securities, selling or exercising stock subscription or conversion rights, participating in foreclosures, reorganizations, consolidations, mergers, liquidations, pooling agreements and voting trusts, and assenting to corporate sales, leases and encumbrances; the trustee, however, to assume or be under no personal liability in respect of any such bonds, shares and/or other securities at any time held hereunder. To reimburse the trustee from the income and/or principal of the trust estate for any such liability or expense incurred by the [150] trustee by reason of the trustee's ownership and/or holding of any property received and/or held in this trust. All discretions in this trust conferred upon the trustee shall, unless specifically limited, be absolute and uncontrolled and their exercise conclusive on all persons interested in this trust or the trust estate. The powers and discretions of the trustee enumerated herein are not to be construed as a limitation upon the trustee's general powers and discretions but the trustee in addition thereto is vested with and shall have, for the full duration of this trust, as to the trust estate, the income therefrom, and in the execution of this trust, the same and all the powers and discretions

Exhibit B—(Continued)

that an absolute owner of property has or may have.

ARTICLE II

The whole title, legal and equitable, in fee, to the trust estate, is and shall be vested in the trustee as such title in the trustee is necessary for the trustee's due execution of this trust. The beneficiaries hereunder take no estate or interest therein and their interests hereunder are personal property only consisting of the right to enforce the due performance of this trust.

ARTICLE III

From the gross income of the trust estate and/or if it be necessary, from the trust estate, the trustee shall first pay and discharge when due and payable any and all taxes, assessments and other charges imposed by [151] public authority on the trust estate or any part thereof, and may also first pay and discharge when due and payable any and all reasonable costs, expenses, charges and liabilities necessarily expended or incurred by the trustee in connection with the collection, care, administration, management or distribution of the trust estate and/or any part thereof and/or any income therefrom and/or the protection of the trust estate and/or any part thereof and/or this trust and/or its defense against legal, equitable and/or other attack, and also, if the trustee is a corporation and/or a person or persons other than said George S. Gaylord and/or Gertrude H. Gaylord above named (the word

Exhibit B—(Continued)

"corporation" including a national banking association) reasonable fees or compensation for the services of the trustee in the administration of this trust.

ARTICLE IV

The entire net income received from the trust estate and available for distribution shall be paid and distributed by the trustee, either monthly, quarterly or semiannually as the circumstances and condition of the trust estate will most conveniently permit, but in any event annually, to Margaret Gaylord Ruppel and Gertrude Gaylord (who are the daughters of said George S. Gaylord and Gertrude H. Gaylord above named, the said Margaret Gaylord Ruppel having been born on the 10th day of November, 1904, and the said Gertrude Gaylord having [152] been born on the 31st day of May, 1916) and the survivor of said daughters Margaret Gaylord Ruppel and Gertrude Gaylord, share and share alike if both of them be then living; provided, however, that in the event of the death of either said Margaret Gaylord Ruppel or Gertrude Gaylord prior to the termination of this trust leaving surviving her any lawful issue, then the share of the net income of the trust estate which said Margaret Gaylord Ruppel or Gertrude Gaylord so dying would otherwise be entitled to receive and have paid to her if she had continued to live, shall be paid to such lawful issue of her as long as such lawful issue shall continue to live during the exist-

Exhibit B—(Continued)

ence of this trust, such issue to take by right of representation and per stirpes and not per capita. While any beneficiary of this trust is a minor or otherwise legally incapacitated to handle personally any of the net income of the trust estate payable to him or her, then the same or any part thereof may by the trustee be paid to such beneficiary's duly appointed guardian or guardians, if any. Any part of the net income of the trust estate which the trustee would otherwise pay as in this Article IV above provided directly to any beneficiary of this trust and/or his or her guardian or guardians, if any, may, in the sole judgment and discretion of the trustee, instead of such direct payment by the trustee, be applied by the trustee to the use and/or for the proper care, maintenance and/or support and/or education [153] of such beneficiary.

ARTICLE V

This trust shall ipso facto cease and terminate upon the happening of either of the following events, whichever shall first happen: the attainment of the age of thirty (30) years by said Gertrude Gaylord or her death prior to her attaining such age of thirty (30) years.

ARTICLE VI

Upon the termination of this trust as hereinabove in Article V provided, all of the trust estate then in the possession or under the control of the trustee as the same then exists, shall immediately vest in

Exhibit B—(Continued)

and be delivered, paid, conveyed, assigned and transferred by the trustee unto said Margaret Gaylord Ruppel and Gertrude Gaylord or the survivor of them living at the time of said termination of this trust, share and share alike, however, if both of them shall then be living; provided, however, that in the event of the death of either of them prior to said termination of this trust leaving her surviving at the time of said termination of this trust lawful issue, then the share of the trust estate which said Margaret Gaylord Ruppel or Gertrude Gaylord so dying would have taken hereunder if she had been living at the time of said termination of this trust shall, upon said termination of this trust, immediately vest in and be delivered, paid, conveyed, assigned and transferred unto her said lawful issue, such lawful issue, however, to take per stirpes and by right of representation and not [154] per capita. In the event that upon the termination of this trust as hereinabove in Article V provided there shall then be living neither said Margaret Gaylord Ruppel nor said Gertrude Gaylord nor any lawful issue of either of them, then upon said termination of this trust all of the trust estate then in the possession or under the control of the trustee as the same then exists shall immediately vest in and be delivered, paid, conveyed, assigned and transferred unto said Gertrude H. Gaylord, the wife of said George S. Gaylord.

Exhibit B—(Continued)

ARTICLE VII

Every beneficiary of this trust is hereby restrained from in any manner anticipating, impairing, encumbering, alienating and/or disposing of his or her right, interest and/or estate, or any thereof, in and/or to any principal and/or income of the trust estate, and is without power so to do, nor shall any such right, interest and/or estate be subject to any liability or obligation of him or her or to any judgment, attachment, garnishment, execution, process of law, transfer by operation of law, bankruptcy proceeding or claim or demand of any creditor or other person than the beneficiary named. All payments, deliveries and distributions to be made under the provisions of this trust, unless in this declaration otherwise expressly provided, shall be payable, deliverable or distributable and only be made directly and personally to the beneficiary [155] or beneficiaries concerned and upon his, her or their personal receipt therefor and not otherwise, which personal receipt shall be a condition precedent to the making of any such payment, delivery or distribution.

ARTICLE VIII

In making any payment, distribution or delivery of any part of the principal of the trust estate the trustee shall make all divisions, partitions, allotments and distributions to effect such payment, delivery or distribution as and according to such

Exhibit B—(Continued)

method or procedure as the trustee may in the sole judgment and discretion of the trustee deem proper, and any and all acts of the trustee in determining the relative values of the property of the trust estate for the purpose of such division, partition, allotment, distribution and/or payment shall be conclusive on all persons interested therein. The trustee shall also make such conveyances, assignments and transfers and execute such writings and instruments as may be necessary to confirm in the payee, deliveree or distributee hereunder title and possession to the part of the principal of the trust estate so paid, delivered or distributed.

ARTICLE IX

In the event that any provision or provisions of this instrument or trust is or are, or is or are adjudged by a court of competent jurisdiction to be for any reason invalid or unenforceable, then the remainder hereof, dis- [156] regarding such provision or provisions, shall subsist and be carried into effect. The invalidity of any use or trust herein declared, if ever decreed by a court of competent jurisdiction, shall not vitiate such as are valid.

ARTICLE X

Said George S. Gaylord and Gertrude H. Gaylord, his wife, or either of them, shall have the right at any time, with the written consent of the trustee but not otherwise, to add to this trust other por-

Exhibit B—(Continued)

erty which, upon acceptance thereof by the trustee, shall become a part of the trust estate to be held in trust for the uses and purposes set forth in this instrument and upon all of the terms and conditions hereof.

ARTICLE XI

Said George S. Gaylord and Gertrude H. Gaylord, his wife, or either of them, shall have the right at any time to resign as trustee of this trust by signing an instrument in writing declaring that they or he or she (as the case may be) so resigns as the trustee of this trust and acknowledging the execution of such instrument before a notary public or other officer authorized to take acknowledgments, which acknowledgment shall be certified so as to entitle the same to be recorded, and by recording such instrument in the office of the County Recorder of the County of Los Angeles, State of California. Said instrument in writing of such resignation shall be effective upon and as of the time of such recordation. In the event of the death of either said [157] George S. Gaylord or Gertrude H. Gaylord, or his or her resignation as trustee of this trust, or his or her inability or capacity to act as such trustee, then the other one of said two persons, viz., George S. Gaylord and Gertrude H. Gaylord, shall act and be entitled to act as trustee of this trust and as such trustee shall have all rights, powers, authority, discretion and exemptions in this instrument provided for the trustee of this trust. Said George S. Gaylord shall have the right

Exhibit B—(Continued)

by an instrument in writing signed by him, and acknowledged by him before a notary public, or other officer authorized to take acknowledgments, which acknowledgment shall be certified so as to entitle the same to be recorded, and recorded in the office of said County Recorder, to appoint the successor or successors as the trustee (whether one or more) of this trust in the event that neither of the two original trustees of this trust, viz., said George S. Gaylord and Gertrude H. Gaylord, is acting as the trustee. In the absence of such appointment by said George S. Gaylord, said Gertrude H. Gaylord shall have the right by an instrument in writing signed by her and acknowledged by her before a notary public, or other officer authorized to take acknowledgments, and certified so as to entitle the same to be recorded, and recorded in the office of said County Recorder, to appoint such successor or successors as the trustee (whether one or [158] more) of this trust in the event that neither of the two orginal trustees of this trust, viz., said George S. Gaylord and Gerrude H. Gaylord, is acting as the trustee. In the event of the death of said George S. Gaylord or his resignation as trustee of this trust, or his inability or incapacity to act as such trustee, and of the death of said Gertrude H. Gaylord, or her resignation as the trustee of this trust, or her inability or incapacity to act as such trustee, then, in any such event and in the absence of any such appointment by said George S. Gay-

Exhibit B—(Continued)

lord or Gertrude H. Gaylord of the successor or successors as such trustee, The Northern Trust Company, of Chicago, Illinois, any successor and/or assign of said corporation whether by way of consolidation, merger, transfer of trust business, conversion into a state bank or otherwise, shall ipso facto succeed and act as the trustee of this trust.

ARTICLE XII

The word "trustee" as used in this instrument, means, unless otherwise expressly indicated, not only said first named trustee George S. Gaylord and Gertrude H. Gaylord and the survivor of them, but as well their successor or successors or the successor or successors of either of them as trustee or trustees (as the case may be) of this trust, the singular number including the plural where necessary. No bond or bonds or other security whatever shall ever be [159] required of the trustee for the performance of any duty or trust hereunder.

In Witness Whereof said George S. Gaylord and Gertrude H. Gaylord as trustee have set their hands and seals to this instrument this 7th day of November, 1935, at Pasadena, California.

Executed in Quadruplicate.

[Seal] GEORGE S. GAYLORD

[Seal] GERTRUDE H. GAYLORD

Exhibit B—(Continued)

State of California,
County of Los Angeles—ss.

On this 11th day of December, 1935, before me, J. C. Humphreys, a Notary Public in and for said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared George S. Gaylord and Gertrude H. Gaylord, his wife, personally known to me to be the persons whose names are subscribed to the within and foregoing instrument, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in said county the day and year in this certificate first above written.

(Notarial Seal) J. C. HUMPHREYS
Notary Public in and for the County of Los Angeles, State of California. [160]

State of California,
County of Los Angeles—ss.

Before Me, the undersigned authority, a Notary Public in and for Los Angeles County, California, on this day personally appeared George S. Gaylord and Gertrude H. Gaylord, his wife, both known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they each executed the same for the purposes and consideration therein expressed, and the said Gertrude H. Gaylord, wife of the said George S. Gaylord, having been examined by me privily and apart from her husband and having the same

Exhibit B—(Continued)

fully explained to her, she, the said Gertrude H. Gaylord, acknowledged such instrument to be her act and deed, and she declared that she had willingly signed the same for the purposes and consideration therein expressed, and that she did not wish to retract it.

Given Under My Hand And Seal of Office, this 6th day of January, 1938.

(Notarial Seal) J. C. HUMPHREYS
Notary Public in and for Los Angeles County, California.

My Commission Expires June 29th, 1939. [161]

EXHIBIT C

DECLARATION BEING A PART OF A CERTAIN DECLARATION OF TRUST DATED NOVEMBER 7, 1935.

Know All Men By These Presents:

That Whereas the undersigned, George S. Gaylord and Gertrude H. Gaylord, his wife, of the City of Pasadena, in the County of Los Angeles, State of California, do in and by an instrument of even date herewith entitled Declaration Of Trust certify and declare and in and by said instrument have certified and declared that they hold and shall and will hold the following described personal property, to-wit: seven thousand (7,000) shares of the common capital stock of Marathon Paper Mills Com-

pany, a Wisconsin corporation, of the par value of Twenty-five Dollars (\$25.00) per share, and any and all proceeds thereof, In Trust, Nevertheless, for the uses and purposes and upon the terms and conditions set forth in said Declaration of Trust, reference to which Declaration of Trust is hereby made for further particulars thereof; Now, Therefore, said George S. Gaylord and Gertrude H. Gaylord do further certify and declare that the trust created and provided for in said Declaration of Trust was always intended and is intended by said trustors and trustees, George S. Gaylord and Gertrude H. Gaylord, to be and is and shall always be absolutely irrevocable and that this further declaration of said undersigned is and is intended to be and shall always be [162] a part of said Declaration of Trust and is and is intended to be and shall always be taken with and construed as a part of said Declaration of Trust the same as though this present declaration had been physically incorporated in said Declaration of Trust.

In Witness Whereof, said George S. Gaylord and Gertrude H. Gaylord, said trustors and trustees, have set their hands and seals to this instrument as of this 7th day of November, 1935, at Pasadena, California.

Executed In Quadruplicate.

[Seal] GEORGE S. GAYLORD

[Seal] GERTRUDE H. GAYLORD

State of California,
County of Los Angeles—ss.

George S. Gaylord, being first duly sworn, deposes and says that he is the George S. Gaylord named in the foregoing instrument and that he has read and understands the same and that all statements made in said instrument are and each of said statements is true and correct.

GEORGE S. GAYLORD

Subscribed and sworn to before me this 27th day of March, 1940.

[Notarial Seal] J. C. HUMPHREYS

Notary Public in and for the County of Los Angeles, State of California. [163]

State of California,
County of Los Angeles—ss.

Gertrude H. Gaylord, being first duly sworn, deposes and says that she is the Gertrude H. Gaylord named in the foregoing instrument and that she has read and understands the same and that all statements made in said instrument are and each of said statements is true and correct.

GERTRUDE H. GAYLORD

Subscribed and sworn to before me this 27th day of March, 1940.

[Notarial Seal] J. C. HUMPHREYS

Notary Public in and for the County of Los Angeles, State of California.

State of California,
County of Los Angeles—ss.

On this 27th day of March, 1940, before me, J. C. Humphreys, a Notary Public in and for said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared George S. Gaylord and Gertrude H. Gaylord, his wife, personally known to me to be the persons whose names are subscribed to the within and foregoing instrument, and acknowledged to me that they executed the same. [164]

In Witness Whereof, I have hereunto set my hand and affixed my official seal in said county the day and year in this certificate first above written.

[Notarial Seal] J. C. HUMPHREYS

Notary Public in and for the County of Los Angeles, California.

State of California,
County of Los Angeles—ss.

Before Me, the undersigned authority, a Notary Public in and for Los Angeles County, California, on this day personally appeared George S. Gaylord and Gertrude H. Gaylord, his wife, both known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they each executed the same for the purposes and consideration therein expressed, and the said Gertrude H. Gaylord, wife of the said George S. Gaylord, having been examined by me privily and apart from her husband and having the same

fully explained to her, she, the said Gertrude H. Gaylord, acknowledged such instrument to be her act and deed, and she declared that she had willingly signed the same for the pur- [165] poses and consideration therein expressed, and that she did not wish to retract it.

Given Under My Hand And Seal Of Office, this 27th day of March, 1940.

[Notarial Seal] J. C. HUMPHREYS

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires June 26-1943. [166]

EXHIBIT D

Form 709
Treasury Department
Internal Revenue
Service

GIFT TAX RETURN

CALENDAR YEAR 1935

Revised December 1934

(To be filed in duplicate under the provisions of the
Gift Tax Act of 1932, as Amended)

(Space for use of
Collector)

(Space for use of
Bureau)

Name of Donor George S. Gaylord
Address 639 Rosemont Ave., Pasadena, Calif.
Citizenship U. S. A.
Residence Above

Have you (the donor), during the calendar year indicated above, without an adequate and full consideration in money or money's worth, made any transfer exceeding \$5000 in value (or regardless of value if a future interest) as follows? (Answer "Yes" or "No."): yes.

Exhibit D—(Continued)

1. By the creation of an irrevocable trust for the benefit of another: yes;
2. By making additions to an irrevocable trust previously created for the benefit of another: no;
3. By permitting a beneficiary (other than yourself) to receive the income from a revocable trust, where you possessed the power of revocation and chose during the year not to exercise it, whether such trust was created before or after the attainment, on June 6, 1932, of the Gift Tax Act of 1932: no;
4. By relinquishing a power to revoke a trust created for the benefit of another: no;
5. By permitting another to withdraw funds from a joint bank account which were deposited by you: no;
6. By irrevocably assigning a life insurance policy, or by naming a beneficiary of a policy without retaining any of the legal incidents of ownership therein: yes;
7. By paying a premium under an insurance policy in which you retain none of the legal incidents of ownership and the proceeds of which are payable to a beneficiary other than yourself or your estate: no;
8. By conveying title to another and yourself as joint tenants or to your wife or husband and yourself as tenants by the entirety: no;
9. By any other method, direct or indirect, whereby another received a gift: no.

If the answer is "Yes" to any of the foregoing, such transfer should be fully disclosed under schedule A or B.

Exhibit D—(Continued)

COMPUTATION OF AMOUNT OF NET
GIFTS FOR YEAR

CS

1. Amount of gifts for year other than charitable, etc., gifts (item c, schedule A)	\$125,278.08
2. Amount of charitable, public, and similar gifts for year (item c, schedule B)	50
3. Total amount of gifts for year (item 1 plus item 2)	\$125,328.08
4. Amount of charitable, public, and similar gifts for year (item c, schedule B)	50.00
5. Specific exemption claimed (not exceeding \$50,000, less total amount of specific exemption claimed for preceding years)	50,000.00
6. Total deductions (item 4 plus item 5).....	50,050.00
7. Amount of net gifts for year (item 3 minus item 6)	\$75,278.08

[167]

COMPUTATION OF TAX

1. Amount of net gifts for year (item 7, above).....	\$75,278.08
2. Total amount of net gifts for preceding year (item b, schedule C) 1st sup. Int 2.97	0
3. Total net gifts (item 1 plus item 2).....	\$75,278.08
4. Tax computed on item 3.....	\$
5. Tax computed on item 2.....	\$
6. Tax on net gifts for year (item 4 minus item 5)....	\$ 2,531.27

Exhibit D—(Continued)

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements, if any, has been examined by me, and to the best of my knowledge and belief, is a true, correct, and complete return for the calendar year stated, pursuant to the Gift Tax Act of 1932, as amended, and the regulations issued thereunder, and no transfer required by said law and regulations to be returned other than the transfer or transfers disclosed herein under schedules A or B was made by me (the donor) during said calendar year.

G. S. GAYLORD

(Signature of donor/executor)

Sworn to and subscribed before me this 3rd day of February, 1936.

(Notarial Seal)

ALICE F. JACKSON

(Signature and title of officer administering oath)

[168]

SCHEDULE A.—GIFTS DURING YEAR OTHER THAN CHARITABLE, PUBLIC, AND SIMILAR GIFTS

Item No.	Description of gift, motive, donee's name and address, and relationship to donor	Date of Gift	Value at Date of Gift
5000	Shares of common stock of Marathon Paper Mills Co. of Wausau, Wis., to a trust for benefit of Margaret G. Ruppel and Gertrude Gaylord my daughters	Nov 7 1935	\$125,000.00 OK e25
1	5 room residence 1015 Davis St., Gendale, Calif., assessed by county tax appraiser at \$1200.00 1935: Tract 5086 as per book 110 Pages 63-64 map of Los Angeles County.....	June 11 '35	3000. mo. R e100

Exhibit D—(Continued)

Schedule A.—(Continued)

Item No.	Description of gift motive, donee's name and address, and relationship to donor	Date of Gift	Value at Date of Gift
10	Shares Latisteel Corp. 1310 No E. Foothill Blvd., Pasadena, data Calif., new corporation 100.00		1000.00
SWE	SWE par. 1000.00 represents amount paid in on above stock....	Dec. 12 1935	
1	Northwestern Mutual Life Ins. Co. policy 653962, see attached	Dec. 13 '35	1800.06
1	Northwestern Mutual Life Ins. Co. policy 912851, see attached	Dec. 13 '35	1499.33
1	Northwestern Mutual Life Ins. Co. policy 2037662, see attached	Dec. 13 '35	7662.85
1	New York Life Ins. Co. policy 6175331, see attached	Dec. 10 '35	315.84
	All above Insurance policies conveyed to Gertrude H. Gaylord, my wife, Margaret G. Ruppel and Gertrude Gaylord, my daughters, shares and share alike or to the survivors.		
(a)	Total	\$140,278.08	
(b)	Less total exclusions not exceeding \$5,000 for each donee (except future interests).....	15,000.00	
(c)	Included amount of gifts for year other than charitable, etc., gifts	\$125,278.08	

Exhibit D—(Continued)

SCHEDULE B.—CHARITABLE, PUBLIC, AND SIMILAR
GIFTS DURING YEAR

Item No.	Description of gift, name and address of donee, and character of institution	Date of Gift	Value at Date of Gift
	Community Chest of Pasadena, Calif.	July 1935	\$ 50.00
(a) Total			\$
(b) Less total exclusions not exceeding \$5,000 for each donee (except future interests)			.....
(c) Included amount of charitable, public, and similar gifts for year			\$

SCHEDULE C.—RETURNS, AMOUNTS OF SPECIFIC EXEMPTION, AND NET GIFTS FOR PRECEDING YEARS
(Subsequent to June 6, 1932)

[Followed by form not filled in]

[169]

Northwestern Mutual Life Insurance Company—face of policy \$2500.00, issued March 2, 1906, #653962 net cash value December 13, 1935, \$1800.06 paid up as to premiums. Straight Life.

Northwestern Mutual Life Insurance Company—face of policy \$3000.00, issued February 1, 1912, #912851 net cash surrender value December 13, 1935, \$1499.33 paid up as to premiums. Straight Life.

Northwestern Mutual Life Insurance Company—face of policy \$50,000.00, issued Dec. 1, 1927, #2037662 net cash surrender value December 13, 1935, \$10,930.94 less loan on policy \$3267.09 equals net value \$7662.85 premiums \$2131.00. Straight Life.

New York Life Insurance Company—face of policy \$8415.00 issued July 28, 1917, #6175331 net cash surrender value December 10, 1935, \$5145.84 less loan against same \$4830 equals \$315.84 net value. Straight Life.

All values furnished by Insurance Cos.

[170]

EXHIBIT E

Form 709
Treasury Department
Internal Revenue
Service

GIFT TAX RETURN

6th Calif.
68:3

CALENDAR YEAR 1935

Revised December 1934(To be filed in duplicate under the provisions of the
Gift Tax Act of 1932, as Amended)(Space for use of
Collector)

Name of Donor Gertrude H. Gaylord
Address 639 Rosemont Ave., Pasadena, Calif.
Citizenship U. S. A.
Residence Above

S

(Space for Use of
Bureau)

Have you (the donor), during the calendar year indicated above, without an adequate and full consideration in money or money's worth, made any transfer exceeding \$5,000 in value (or regardless of value if a future interest) as follows? (Answer "Yes" or "No") : Yes.

Exhibit E—(Continued)

1. By the creation of an irrevocable trust for the benefit of another: yes; no;
2. By making additions to an irrevocable trust previously created for the benefit of another: no;
3. By permitting a beneficiary (other than yourself) to receive the income from a revocable trust, where you possessed the power of revocation and chose during the year not to exercise it, whether such trust was created before or after the en-
- actment, on June 6, 1932, of the Gift Tax Act of 1932: no;
4. By relinquishing a power to revoke a trust created for the benefit of another: no;
5. By permitting another to withdraw funds from a joint bank account which were deposited by you: no;
6. By irrevocably assigning a life insurance policy, or by naming a beneficiary of a policy without retaining any of the legal incidents of ownership therein: no;
7. By paying a premium under incidents of ownership and the proceeds of which are payable to a beneficiary other than yourself or your estate: no;
8. By conveying title to another and yourself as joint tenants or to your wife or husband and yourself as tenants by the entirety: no;
9. By any other method, direct or indirect, whereby another received a gift: no.

If the answer is "Yes" to any of the foregoing, such transfer should be fully disclosed under schedule A or B.

Exhibit E—(Continued)

COMPUTATION OF AMOUNT OF NET
GIFTS FOR YEAR

CS

1.	Amount of gifts for year other than charitable, etc., gifts (item e, schedule A)	\$40,000.00
2.	Amount of charitable, public, and similar gifts for year (item e, schedule B)	0
3.	Total amount of gifts for year (item 1 plus item 2)	\$40,000.00
4.	Amount of charitable, public, and similar gifts for year (item e, schedule B)	0
5.	Specific exemption claimed (not exceeding \$50,000, less total amount of specific exemption claimed for preceding years)	\$40,000.00
6.	Total deductions (item 4 plus item 5).....	40,000.00
7.	Amount of net gifts for year (item 3 minus item 6)	\$ 0

[171]

COMPUTATION OF TAX

[Followed by form not filled in]

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements, if any, has been examined by me, and to the best of my knowledge and belief, is a true, correct, and complete return for the calendar year stated, pursuant to the Gift Tax Act of 1932, as amended, and the regulations issued thereunder and no transfer required by said law and regulations to be returned other than the transfer or transfers disclosed herein under schedules A or B was made by me (the donor) during said calendar year.

GERTRUDE H. GAYLORD

(Signature of donor/executrix)

Exhibit E—(Continued)

Sworn to and subscribed before me this 3rd day of February, 1936.

(Notarial Seal)

ALICE F. JACKSON

(Signature and title of officer administering oath)

AFFIDAVIT

I swear (or affirm) that I prepared this return for the person named herein, and that this return, including the accompanying schedules and statements, if any, is a true, correct, and complete statement of all the information respecting the donor's gift tax liability of which I have any knowledge.

G. S. GAYLORD D

(Signature of person preparing return)

Sworn to and subscribed before me this 3rd day of February, 1936.

(Notarial Seal)

ALICE F. JACKSON

(Signature and title of officer administering oath)

[172]

SCHEDULE A.—GIFTS DURING YEAR OTHER THAN CHARITABLE, PUBLIC, AND SIMILAR GIFTS

Item No.	Description of gift motive, donee's name and address, and relationship to donor	Date of Gift	Value at Date of Gift
2000	Shares of Common Stock of Marathon Paper Mills Co. of Wausau, Wis.	Nov 7 1935 at 25	OK \$50,000.00
	Data submitted Geo. S. Gaylord X ref. donee says 7000 shs?	F. B.	
(a) Total			\$50,000.00
(b) Less total exclusions not exceeding \$5,000 for each donee (except future interests).....			10,000.00
(c) Included amount of gifts for year other than charitable, etc., gifts			\$40,000.00

Exhibit E—(Continued)

SCHEDULE B.—CHARITABLE, PUBLIC, AND SIMILAR GIFTS DURING YEAR

Item No.	Description of gift, name and address of donee, and character of Institution	Date of Gift	Value at Date of Gift
	None		
(a) Total		\$	
(b) Less total exclusions not exceeding \$5,000 for each donee (except future interests).....			
(c) Included amount of charitable, public, and similar gifts for year		\$	

SCHEDULE C.—RETURNS, AMOUNTS OF SPECIFIC EXEMPTION, AND NET GIFTS FOR PRECEDING YEARS (Subsequent to June 6, 1932)

Calendar Year	Collection District in which Prior Return was filed	Amount of Specific Exemption	Amount of Net Gifts
	None	\$	\$
(a) Total amount of specific exemption claimed for preceding years		\$.....	
(b) Total amount of net gifts for preceding years			\$.....

EXHIBIT F

SHOWING COST OF MARATHON PAPER
MILLS COM. STOCK

Menasha Printing and Carton Co.

Value March 1, 1913	\$350,000.00
July 1, 1917 invested	152,500.00
	502,500.00
Less—Preferred stock sold July 1917.....	20,000.00
	\$482,500.00

Received for 3,357 shares Menasha Printing and Carton Co.

stock, securities of Marathon Paper Mills Co., as follows:

\$1,038,000.00 par 5½% Bonds	\$ 1,038,000.00
6,728 shares common stock at 130.30.....	876,658.40
	\$ 1,914,658.40

\$1,038,000.00 equals 54.21% of total received

\$ 876,658.40 equals 45.79% of total received

45.79% of \$482,500.00 equals \$220,936.75 or original cost of 6,728 shares of common stock or \$32.84 per share.

Stock was divided four for one, making original cost of present common shares \$8.21 per share. [174]

EXHIBIT G

MEMORANDUM SHOWING HOW VALUE OF
STOCK OF MARATHON PAPER MILLS
COMPANY, OWNED BY GEORGE S. GAY-
LORD, IS ESTABLISHED.

This stock originated with various investments in Menasha Carton Company, a corporation, which was merged August 1917, with Menasha Printing

Exhibit G—(Continued)

Company to form the Menasha Printing & Carton Company. The basis for the new securities issued in this merger was the actual value of physical assets of the merged companies which were appraised at \$186,000.00 for the Menasha Carton Company, and \$774,000.00 for the Menasha Printing Company. Common stock in the amount of \$500,000.00 par value and preferred stock or bonds in the amount of \$460,000.00 par value were issued by the new company. As the new securities were issued for physical assets only, the par value of the stock and bonds issued does not reflect the fair market value. The fair market value includes goodwill valued under ordinary circumstances by taking the average earnings for a number of years just prior to date value is to be determined. As the Menasha Carton Company is the Company in which Mr. Gaylord's holdings originated, and on which the value of his holdings in Marathon Paper Mills Company depended, it becomes necessary to arrive at the value as of August 1917 of his interest in that company as his basis for his Marathon Paper Mills Company stock.

Due to the entry of the United States in war in 1917, business in most every line had increased materially over the preceding years and the value of the business could not be [175] calculated on the basis of the prior years. More weight necessarily had to be given to the present and future, particularly when a business had just started a few years prior to that time. Market quotations for stocks

Exhibit G—(Continued)

generally had reached a very high level by August 1917. The earnings of Menasha Carton Company, Menasha Printing Company and the consolidated company, obtained from old records of the companies show a very rapid rise starting in 1917, which continued through the subsequent years, substantiating the value existing in 1917. These earnings are as follows:

	Menasha Carton Company	Menasha Printing Company	Consolidated Company
1915	\$29,369.09	\$ 99,889.97	\$ -----
1916	28,225.90	286,271.56	-----
1917 (a)	56,220.99	-----	(b) 303,236.91
1918	-----	-----	297,825.12
1919	-----	-----	232,595.87

- (a) Seven months only—same basis for twelve months—
\$96,378.84
- (b) Includes \$38,289.80 Carton Company profits for five
five months.

Tax payer believes that the 1917 earnings of the Carton Company capitalized at ten per cent reflect correctly the fair market value of the stock of that company establishing the basis of his stock in Marathon Paper Mills Company although subsequent earnings of the new company are much greater. The rate per share of Marathon stock is arrived by using the value of Marathon Carton Company stock as of August 1, 1917, based upon earnings for the first seven months of that year capitalized at 10% as follows: [176]

Exhibit G—(Continued)

Value of Carton Company stock, August 1917.....	\$963,788.40
G. S. Gaylord's share—337/726	\$447,378.40
Additional amount paid for shares in new corporation	152,161.11
Total basis 1,960 shares Menasha Printing & Carton Co. and 190 shares of preferred stock (or bonds)	599,539.51
Less—preferred stocks (or bonds) sold.....	19,000.00
Net value of stock (average per share \$296.194)	\$580,539.51

[177]

COMPUTATION OF BASIS OF MARATHON PAPER
MILLS COMPANY STOCK

Value of Manasha Carton Company stock August 1917, based upon earnings of Carton Co. seven months of 1917	\$963,788.40
G. S. Gaylord share (337/726)	447,378.40
Additional amount paid to acquire 1960 shares of common and 190 shares of preferred (also referred to as bonds) Menasha Printing and Carton Co....	152,161.11
	599,539.51
Less—value allocated to preferred stock or bonds (later retired)	19,000.00
Net value of common stock (1960 shares).....	580,539.51
Value per share \$296.194	
Deduct cost of sales to employees prior to January 1, 1925—185 shares at \$296.194	54,795.89
Net value of 1,775 shares	525,743.62
Stock dividend (1-2-25) 100%—reduces value per share to \$148.097, and increases number of shares to 3,550.	

Exhibit G—(Continued)

Less—Cost of—

350 shares exchanged for 432 shares	
Robert Gaylord, Inc. (1-2-25)—350	
shares at \$148.097	\$ 51,833.95
195 shares sold 10-5-25 and 4-1-26	
at 148.097	28,878.92
	80,712.87

Remaining value for 3,005 shares

(\$148.097 per share) 445,030.75

Add—352 shares acquired (8-24-27) from C. W. Gaylord for 432 shares of Robert Gaylord, Inc. (value based upon value of 3357 shares owned after this was acquired, all of which was exchanged for \$1,914,658.40 in stock and bonds of new corporation—352/3357 of \$1,914,658.40..... 200,762.51

Cost of Marathon stock and bonds..... 645,793.26

[178]

Bonds 54.21% of \$645,793.26 or \$350,084.53

Stock 45.79% of \$645,793.26 or \$295,708.73

Basis for each share—

 $\$295,708.73 \div 6728 = 43.952$ per share

Stock split—4 for 1 December 2, 1929, reducing price to \$10.988 correct basis for all shares sold by George S. Gaylord in 1935, 1936, 1937, 1938 and all excepting last 100 shares sold in 1939, and for all shares sold by Gertrude H. Gaylord acquired by gift from George S. Gaylord, 2-9-32 and for all shares sold by the trustees out of the trust estate acquired from George S. Gaylord and Gertrude H. Gaylord in 1935. The last 100 shares acquired by George S. Gaylord was purchased at \$17.00 per share.

Note—Stock transactions prior to consolidation with Marathon Paper Mills Co. are set forth in Rev-

Exhibit G—(Continued)

venue Agents report dated January 20, 1941, on George S. Gaylord in Exhibit A.

[Endorsed]: U.S.B.T.A. Filed Nov. 26, 1941.

[179]

[Title of Board and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits, and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the taxes in controversy are income taxes for the calendar years 1936, 1937, 1938 and 1939; denies the remainder of the allegations contained in paragraph 3 of the petition.

4. (I) to (XLIII), inclusive. Denies the allegations of error contained in subparagraphs (I) to (XLIII), inclusive, of paragraph 4 of the petition.

5. (a) The respondent admits that as of November 7, 1935, the petitioner's husband, George S. Gaylord, and the [180] petitioner executed a certain declaration of trust in which they named themselves as "trustee" (sic) and their two daughters, Margaret Gaylord Ruppel and Gertrude Gaylord, as beneficiaries, and in the event of the death of either or both of them during the existence of the trust,

the issue of either or both of them, as the case might be, due to the death of one or both of the first-named beneficiaries.

Respondent also admits that the trust embraced the property substantially of the kind and amount described by the petitioner, but because respondent does not know as a matter of fact whether or not it was recorded in the places and under the circumstances stated by the petitioner, and does not know as a matter of fact whether or not the purported gift tax returns were filed and gift taxes paid thereon in the manner and form related by petitioner, and does not know as a matter of fact whether the other matter and things related by petitioner existed, happened or were done in the manner and at the times stated by the petitioner in said subparagraph (a) of paragraph 5 of the petition, the respondent therefore, for lack of information sufficient upon the basis of which to form a belief as to the truth or accuracy thereof, denies each and every allegation contained in said subparagraph (a) not expressly admitted. Furthermore, respondent denies that the trust dated November 7, 1935, created by the petitioner was an irrevocable trust. [181]

(b) Denies the allegations contained in subparagraph (b) of paragraph 5 of the petition.

(c) Respondent admits that the two named beneficiaries of said trust, Margaret Gaylord Ruppel and Gertrude Gaylord Bruce (named in said declaration of trust as Gertrude Gaylord), are the daugh-

ters of the petitioner, Gertrude H. Gaylord, and George S. Gaylord, her husband, and that said Margaret Gaylord Ruppel was born on November 10, 1904, and said Gertrude Gaylord Bruce was born on May 31, 1916, and that each of said beneficiaries has lawful issues now living. Respondent also admits that said Margaret Gaylord Ruppel has two children now living, to-wit, a daughter, Barbara Brunker, who was born October 14, 1925, and a son, Robert Brunker, born June 3, 1928. It is further admitted that said Gertrude Gaylord Bruce has one child, to-wit, a daughter, Ann Bruce, born April 20, 1938. For lack of information sufficient upon the basis of which to form a belief as to the truth or accuracy of the remaining allegations of said subparagraph (e) of paragraph 5 of the petition, respondent denies the same.

(d) For lack of information sufficient upon the basis of which to form a belief as to the truth or accuracy of subparagraph (d) of paragraph 5 of the petition, respondent denies the same. [182]

(e) Denies the allegations contained in subparagraph (e) of paragraph 5 of the petition.

(f) For lack of information sufficient upon the basis of which to form a belief as to the truth or accuracy of subparagraph (f) of paragraph 5 of the petition, respondent denies the same.

(g) and (h). Denies the allegations contained in subparagraphs (g) and (h) of paragraph 5 of the petition.

(i) (1) and (2). Denies the allegations con-

tained in subparagraph (i), and subsections (1) and (2) thereof, of paragraph 5 of the petition.

(j) Denies the allegations contained in subparagraph (j) of paragraph 5 of the petition.

(k) Admits that in or about March 1938, the petitioner, Gertrude H. Gaylord, in her individual capacity, and her said husband, George S. Gaylord, in his individual and personal capacity, and for the heretofore mentioned trust, by its trustees Gertrude H. Gaylord and George S. Gaylord purchased each an undivided one-third interest in business property situated in the City of Santa Monica, California, consisting, at the time, of land improved with a storeroom building then occupied by several differenttenants holding under separate rental contracts or leases, and admits that during said year that the building was acquired the above-described owners thereof demolished and razed the old building and [183] commenced the erection of the new building, but denies that the petitioner and his co-owners, as he alleges, did not contemplate and intend at the time of the purchase of said property to demolish the old building that was thereon and to erect in the place thereof a new building.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore it is prayed that the determination of the Commissioner be approved.

[Signed] J. P. WENCHEL FTH

Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

ALVA C. BAIRD,

Division Counsel.

FRANK T. HORNER,

B. M. COON,

Special Attorneys,

Bureau of Internal Revenue.

BMC/fmt 12/26/41

[Endorsed]: U.S.B.T.A. Filed Jan. 2, 1942. [184]

The Tax Court of the United States

GEORGE S. GAYLORD,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

GERTRUDE H. GAYLORD,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.Docket Nos. 109138, 109273. Promulgated,
February 18, 1944.

FINDINGS OF FACT AND OPINIONS

1. The Civil Code of California, by amendment made in 1931, provides that, unless expressly made irrevocable by the instrument creating it, every voluntary trust (not created prior to the amendment) shall be revocable by the trustor. In 1935 the petitioners, residents of California, decided to make gifts to their two daughters and to effectuate the gifts by creating an irrevocable trust of which the petitioners would be trustees and the daughters the beneficiaries. Petitioners requested their counsel to prepare an instrument to carry out their purpose. The instrument prepared and executed did not contain any provision respecting revocability or irrevocability. Neither petitioners nor their counsel was then aware of the above provision of the Cali-

fornia Civil Code. As soon as he learned of the said provision, counsel drafted an instrument declaring that the trust is and was always intended to be irrevocable. This latter instrument was executed by petitioners on March 27, 1940. *Held*, that under the law of California, the trust was revocable during the taxable years 1936 through 1939 and that the trust income for those years was taxable to the petitioners in the proportion that the amount of corpus contributed by each bore to the total corpus.

2. Basis determined for computing gain or loss on certain shares of corporate stock sold by petitioners and the trust during the years involved herein.

3. In 1938 the petitioners and the trust purchased a certain improved rental property without any intention of removing the building thereon and erecting a new structure. Thereafter during the year it was found desirable to remove the building and erect a new and larger one in order to obtain tenants, and the petitioners decided to do so. Early in the following year the building was removed and a new one erected. *Held*, that the amounts deducted by the petitioners and the trust as losses sustained on the removal of the old building are allowable.

4. Amount of loss determined with respect to the destruction of a pear orchard in order to devote the land to other uses. [185]

Thomas A. J. Dockweiler, Esq., and James W. Bon-
tems, C.P.A., for the petitioners.

Byron M. Coon, Esq., for the respondent.

Turner, Judge: The respondent determined the following deficiencies in income tax against the petitioners for the years indicated:

Year	George S. Gaylord-Docket No. 109138	Gertrude H. Gaylord-Docket No. 109273
	Deficiency	Deficiency
1936.....	\$17,835.82	\$1,087.40
1937.....	12,033.50	4,925.01
1938.....	10,442.62	32.51
1939.....	9,206.82	1,998.71

The questions presented are the correctness of the respondent's action (1) in determining that the income for the years 1936 through 1939 of a trust created by petitioners, and of which they were trustees, was taxable to petitioners for said years; (2) in determining that the basis for computing gain on certain corporate stock sold by petitioners and the trust during 1936 through 1939 was \$2,835.42 per share; (3) in disallowing deductions of \$5,076.11 taken by each of the petitioners and the trust for 1938 as losses sustained on demolition of a building; (4) in disallowing \$3,456 of a deduction of \$4,320 taken by George S. Gaylord in 1939, as a loss sustained on the removal of a pear orchard from a ranch owned by him; and (5) in disallowing \$1,400 of the deductions of \$2,650 taken by each of the petitioners as losses sustained on the destruction by storm of ornamental trees on prop-

erty owned by petitioners and occupied by them as their residence. Issue No. 5 was abandoned by the petitioners at the time of the hearing, leaving the first four issues for determination.

For convenience, the discussion of each issue will follow immediately after the findings of fact relating thereto.

Issue 1.—Taxability to Petitioners of the Income of the Trust.

FINDINGS OF FACT

The petitioners are husband and wife, residents of Pasadena, California, and filed separate income tax returns for 1936 through 1939 with the collector of internal revenue for the sixth district of California.

As the issue of their marriage the petitioners have two daughters, Margaret and Gertrude. Margaret was born on November 10, 1905, and married Albert Brunker in 1923. Two children were born of that marriage; one on October 14, 1925, and the other on June 4, 1927, and both are still living. Subsequently Margaret divorced Brunker, [186] and in 1931 married Frederick Ruppel. Both Margaret and Ruppel are still living. The petitioners' other daughter, Gertrude, was born on May 31, 1916, and on May 29, 1937, married Eugene L. Bruce. Gertrude and Bruce are still living, and have one child, who was born in April 1938.

Sometime prior to September 1935, the petitioners decided to set up a trust for the benefit of their two daughters, and in case of the death of a

daughter, then for the benefit of the children of such daughter. On December 11, 1935, the petitioners signed and acknowledged a declaration of trust, dated November 7, 1935, in which they were designated both grantors and trustees and designated jointly as trustee. A trust, sometimes hereinafter referred to as the Gaylord trust, was declared with respect to 7,000 shares of the common capital stock of Marathon Paper Mills Co., 5,000 shares of which were contributed by Gaylord and 2,000 shares by Mrs. Gaylord.

The trust instrument did not contain any provision relating to its revocability or irrevocability.

When requesting counsel to prepare the trust instrument, Gaylord told him that he and Mrs. Gaylord desired to form an irrevocable trust with respect to the stock. At the time the petitioners signed the trust instrument they were advised by counsel that the trust was irrevocable. After signing the instrument, they left it in the custody of counsel. On February 4, 1936, the petitioners filed gift tax returns, prepared by Gaylord, for 1935, in which they reported the creation of an irrevocable trust and the transfer thereto of the above mentioned shares of stock in Marathon Paper Mills Co., sometimes hereinafter called Marathon. Mrs. Gaylord reported the 2,000 shares of stock contributed by her as having a value of \$50,000, but, by reason of exclusions and the specific exemption taken, she reported no gift tax liability. Gaylord reported total gifts in the amount of \$140,278.08, of which \$125,000 was reported as the value of the 5,000 shares

of Marathon stock contributed by him to the trust. After taking exclusions totaling \$15,000 and a specific exemption of \$50,000, his return showed a gift tax liability of approximately \$2,500, which he paid. Subsequently in 1936 Gaylord paid an additional gift tax of approximately \$100 with respect to the said return. The certificates for the 7,000 shares of Marathon stock were placed in a safe deposit box in California, in the name of Gaylord and Mrs. Gaylord, as trustees, and remained there until the stock was sold. The trustees sold some of the stock in each of the years 1936 through 1939, the last of it being sold in the latter year. For convenience in making delivery upon sale, certificates were sent from time to time to a bank in Chicago, in which the proceeds of all sales were deposited in an account in the names of the petitioners as trustees. [187]

In connection with the purchase of real property situated in Los Angeles County, California, the trustees, on September 23, 1937, had the trust instrument recorded in the office of the county recorder of that county. In 1938 the trustees made certain purchases of real estate situated in Texas, totaling about \$90,000, and in connection therewith had the trust instrument recorded in four counties of that state.

For each of the years 1936 through 1939, a fiduciary income tax return was filed for the trust by the trustees, in which the daughters were shown as the beneficiaries of the trust, with each entitled

to one-half of the income thereof. For each of the said years the daughters filed income tax returns and paid the tax shown to be due thereon. In their returns they reported as taxable income received from the trust the amounts shown by the fiduciary income tax returns as having been distributed to them during the respective years.

At the instance of their counsel, the petitioners on March 27, 1940, signed and acknowledged an instrument reading as follows:

Declaration Being a Part of a Certain Declaration
of Trust Dated November 7, 1935

Know All Men by These Presents:

That Whereas the undersigned, George S. Gaylord and Gertrude H. Gaylord, his wife, of the City of Pasadena, in the County of Los Angeles, State of California, do in and by an instrument of even date herewith entitled Declaration of Trust certify and declare and in and by said instrument have certified and declared that they hold and shall and will hold the following described personal property, to-wit: seven thousand (7,000) shares of the common capital stock of Marathon Paper Mills Company, a Wisconsin corporation, of the par value of Twenty-five Dollars (\$25.00) per share, and any and all proceeds thereof, In Trust, Nevertheless, for the uses and purposes and upon the terms and conditions set forth in said Declaration of Trust, reference to which Declaration of Trust is hereby made for further particulars thereof: Now, Therefore, said George S. Gaylord and Gertrude H. Gaylord to further certify and declare that the trust

created and provided for in said Declaration of Trust was always intended and is intended by said trustors and trustees, George S. Gaylord and Gertrude H. Gaylord, to be and is and shall always be absolutely irrevocable and that this further declaration of said undersigned is and is intended to be and shall always be a part of said Declaration of Trust and is intended to be and shall always be taken with and construed as a part of said Declaration of Trust the same as though this present declaration had been physically incorporated in said Declaration of Trust.

In Witness Whereof, said George S. Gaylord and Gertrude H. Gaylord, said trustors and trustees, have set their hands and seals to this instrument as of this 7th day of November, 1935, at Pasadena, California.

After signing and acknowledging the foregoing instrument, the petitioners left it with their counsel. Thereafter the instrument was recorded in Los Angeles and Calaveras Counties, California, on March 28, 1940, and May 14, 1940, respectively.

[188]

In determining the deficiencies involved herein, the respondent determined that the net income of the trust for the respective years constituted income of the petitioners, as grantors; that since Gaylord had contributed five-sevenths of the total value of the property contributed to the trust, such fractional part of the net income of the trust was taxable to him; and that since Mrs. Gaylord had contributed two-sevenths of the total value of the

property contributed to the trust, such fractional part of the net income of the trust was taxable to her.

OPINION

The petitioners take the position that the Gaylord trust is and always has been an irrevocable trust, that none of the income thereof for the years 1936 through 1939 constituted income to them, or either of them, but that all of such income was the income of their two daughters, share and share alike, and as such was taxable to the daughters. The respondent contends that under the statutes of California the trust was revocable, and that the income of the trust for the years in controversy was taxable to the petitioners in the proportions determined by him.

Prior to 1931, section 2280 of the Civil Code of California provided as follows:

Not revocable. A trust cannot be revoked by the trustor after its acceptance, actual or presumed, by the trustee and beneficiaries, except by the consent of all the beneficiaries, unless the declaration of trust reserves a power of revocation to the trustor, and in that case the power must be strictly pursued.

In 1931, the Legislature of California amended the section to read as follows:

Revocation of trusts. Unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee. When a

voluntary trust is revoked by the trustor, the trustee shall transfer to the trustor its full title to the trust estate. Trusts created prior to the date when this act shall become a law shall not be affected hereby.

Accordingly it is the law of California, and has been since the amendment of section 2280 in 1931, that "every voluntary trust" is revocable by the trustor, unless "expressly made irrevocable by the instrument creating the trust," the only exception to that rule being in the case of trusts created prior to the date of the enactment of the amendment. The trust here was created, and the instrument creating it was executed, in 1935, some four years after the enactment of the amendment in question, and the said instrument did not contain any provision making the trust irrevocable. Furthermore, there can be no doubt, we think, that the trust was a voluntary trust. There is some argument to the effect that the petitioners by mutual promises became [189] obligated, one with the other, to make gifts to their daughters and that the trust was not therefore a voluntary trust within the meaning of section 2280 as amended. That argument is in our opinion without merit. The purpose and intention of the petitioners was to make gifts to or for the benefit of their two daughters, and a gift, which is the transfer of something to another without compensation, implies and denotes an act of choice, a voluntary act. The creation of the trust was merely the method for effecting or making the intended gift, and it

takes its voluntary character therefrom. *Touli v. Santa Cruz County Title Co.* (Cal. App.), 67 Pac. (2d) 404, holding that a deed of trust given as security for the repayment of a loan did not fall within the provisions of section 2280, as amended, is not in point. We think it apparent therefore that, if the petitioners are to prevail, they must do so on other grounds.

The record shows, and we have found as a fact, that the petitioners had in mind the making of a complete and irrevocable grant to trust. We also think it apparent that their counsel who drew the trust instrument so understood, and the respondent has conceded that when counsel drew the instrument he did not know of the 1931 amendment of section 2280. The record also shows that as soon as he learned of the amendment he drafted the instrument executed by the petitioners on March 27, 1940, declaring that the trust "is and shall always be absolutely irrevocable and that this further declaration * * * is intended to be and shall always be a part of said Declaration of Trust and is intended to be and shall always be taken with and construed as a part of said Declaration of Trust the same as though this present declaration had been physically incorporated in said Declaration of Trust." Such being the facts, the petitioners cite and rely on section 3399 of the California Code, which provides that when through fraud or mutual mistake of the parties a written contract does not truly express the intention of the parties, it may

be revised to express such intention, in so far as can be done without prejudice to the rights acquired by third persons, in good faith and for value. Whatever the rights of the parties may be with respect to the revision of the instruments under section 3399, and whatever the retroactive effect of such revision, it is of no moment here, since section 3399 has no application to a purely voluntary deed. *Enos v. Stewart*, 138 Cal. 112; 70 Pac. 1005, and *Robertson v. Melville*, 60 Cal. 354; 212 Pac. 723. In *Enos v. Stewart*, the grantee of a voluntary deed defectively executed sought to have it reformed in equity, after the grantor's death, as against the grantor's heir at law. In denying the relief sought, the Supreme Court of California said:

“* * * It is a universal principle of courts of equity that, in all cases where relief is asked by aiding and correcting mistakes in the execution of instruments [190] and powers, the party seeking such relief must stand upon some equity superior to that of the party against whom he asks it. If the equities are equal, the law must prevail, and the court will remain silent and passive. * * * A court of equity interferes to correct a mistake in a written instrument only in furtherance of justice, and to prevent fraud or some injustice. In this case, by refusing to correct the deed, no fraud or injustice is done to appellant. She has lost nothing, because she paid no consideration for the deed. She has been deprived of nothing the law would otherwise give her. It is true, the intention of the

grantor is not carried out; but it would have been equally true if an attempt had been made to make a will, and it had been defective in a vital part. The court could not reform a will, nor make it so that it would comply with the law. In this case the deceased intended to convey the property, but she did not do so. That intention will not now be carried out in favor of one who paid nothing for the conveyance, and against a lawful heir."

In the light of the above pronouncement of the court, it would seem that not only does section 3399 give no support to the contention made here, but in the case of a voluntary deed the mere existence of an unexecuted intention on the part of the donor or grantor creates no rights in the grantee and takes nothing from the grantor, but leaves the grantor the freedom which he theretofore had, as if no such intention had ever existed.

The petitioners further contend that, under the law of California, a valid oral irrevocable trust can be created in personal property, that the Marathon stock was personal property, and that, since they intended to create an irrevocable trust, the trust actually created has at all times subsequent to its inception in 1935 been valid as an oral irrevocable trust. The obvious answer to that contention is that the record fails to show that there was ever any intention to create an oral trust, irrevocable or otherwise, or that any oral trust was, in fact, created. The only trust created was the written trust described in our findings of fact, and it is that

trust, not some other trust, with which we are here concerned.

Finally, the petitioners contend that the respondent is estopped from claiming or asserting that the Gaylord trust was ever revocable. This contention is grounded on the fact that petitioners in 1936 filed their gift tax returns for 1935, in which they referred to the trust as an irrevocable trust, that the tax shown on the returns was paid and has never been refunded, and that the daughters have consistently reported the income from the trust and paid the tax thereon. They also claim to have attached a copy of the trust instrument to each of the gift tax returns. It is contended that the respondent had full knowledge of the character of the trust as early as 1936 and that he should not now be permitted to claim that it was revocable. Estoppel must be specifically pleaded; otherwise it is not an issue in the case. *El Dorado Oil Works*, 46 B. T. A. 994. It has not been pleaded here.

As we read the facts and the law, the petitioners at all times up to [191] the execution of the instrument of March 27, 1940, had and retained the right to revoke the said trust. To hold otherwise would in effect be a rewriting of the California statute or a making of the trust instrument something it was not. We do not possess the power to do either. Since the grantors had the power to revoke the trust during the years before us, the income therefrom is taxable to them. Section 166 of the Revenue Acts of 1936 and 1938, and of the Internal

Revenue Code. The respondent has properly allocated the trust income, five-sevenths to Gaylord and two-sevenths to Mrs. Gaylord. Colonial Trust Co. v. Commisisoner, 111 Fed. (2d) 740.

**Issue 2.—Basis for Computing Gain on the
Sale of Stock**

FINDINGS OF FACT

About 1911 or 1912, a corporation known as the Menasha Carton Co. was organized and began operations in Menasha, Wisconsin. On July 1, 1917, the outstanding stock of Menasha Carton Co. was 726 shares of common stock, of which 337 shares were owned by Gaylord, 337 shares by S. H. Clinedinst, and the remaining 52 shares by four other individuals. The 337 shares owned by Gaylord had been acquired by him as follows:

Acquired on or before—	Shares	Cost
Mar. 1, 1913	99½	\$9,950.00
Jan. 16, 1914	20	2,000.00
Oct. 20, 1914	94½	9,450.00
Apr. 8, 1915	18	1,800.00
Mar. 31, 1916	100	10,000.00
July 1, 1917	5	1,236.50
 Total.....	 337	 34,436.50

Across the street from the plant of the Menasha Carton Co. was located the Menasha Printing Co., all of the stock of which was owned by Clinedinst. Clinedinst desired to consolidate the assets and businesses of the two corporations into a new cor-

poration, with Gaylord as its manager. It was agreed that Gaylord should purchase sufficient of the stock of the new corporation from Clindestin to bring his holdings therein up to 40 percent of the outstanding stock. Determination of the basis for consolidation was left to Gaylord. He determined that the consolidation should be effected on the basis of the appraised value of the physical assets, plus the book value of the quick assets of each of the old corporations. Determination of the value of the stock of the two old corporations through the capitalization of current earnings at ten times such earnings (regarded by Gaylord as a conservative rate) would have indicated a substantially higher value for the stock of the old corporations than was indicated on the basis of value of assets.

The new corporation, Menasha Printing & Carton Co., was formed [192] during the later half of 1917, and the consolidation was effected as of July 1 of that year, on the basis determined by Gaylord. The appraised value of the physical assets plus the book value of the quick assets of the Menasha Carton Co. was determined to be \$186,000, while the value of the assets of the Menasha Printing Co. was determined to be \$774,000, making a total of \$960,000 as the value of the assets of the two corporations. For these assets, common and preferred stock of the new corporation was issued on a dollar-for-dollar basis, \$500,000 in common stock, and \$460,000 in preferred stock. The com-

mon stock of the new corporation was divided into 5,000 shares and the preferred stock into 4,600 shares, the stock of each class having a par value of \$100 per share. Of the \$186,000 representing the value of the assets of the Menasha Carton Co., \$86,338.89 was allocable to Gaylord's 337 shares of stock. Based on such value and applying the proportions in which the stock of the new corporation was divided between common and preferred, Gaylord was entitled, for his 337 shares of Carton Co. stock, to 449.6815 shares of common stock and 413.7074 shares of preferred stock. The actual division, however, was \$41,000 for 410 shares of preferred stock and \$45,338.89 for 453.3889 shares of common stock. In addition, Gaylord purchased from Clinedinst sufficient shares of common stock of the new corporation to bring his common stock holdings therein to 1,975 shares. In payment for the stock purchased from Clinedinst, he gave his promissory note for \$152,161.11, which, with the \$45,338.89 representing the value of his shares in the Carton Co. stock against which common stock of the new corporation was issued, brought his total payments for the 1,975 shares of common stock to \$197,500. The fair market value of the common shares acquired in the consolidation was \$100 per share. The note given to Clinedinst was dated August 30, 1917, was due three years after date, and bore interest at the rate of 6 percent per annum. It was paid in full on September 29, 1924. Of the 1,975 shares of common stock of the new corporation so acquired by Gaylord, 1,525 shares

were issued to him under certificate No. 2, dated August 30, 1917, and were put up by him as collateral for the payment of the note to Clinedinst. In his income tax return for 1917, Gaylord did not report any income on the exchange of his 337 shares of Menasha Carton Co. stock for stock in the new corporation.

In 1922 or 1923 Gaylord purchased the remaining interest of Clinedinst in the Menasha Printing & Carton Co. In the meantime, all the preferred stock issued in the 1917 consolidation had been retired. During the interval between the consolidation in 1917 and October 31, 1927, Gaylord sold some small lots of his common stock. In 1925 he received a 100 percent stock dividend on the stock then held, and at October 31, 1927, the parties are in agreement that he owned and held 3,357 shares of such stock. Of the stock so held, 350 shares had [193] been transferred by Gaylord in 1925 to his brother, C. W. Gaylord, for 432 shares of the stock of Robert Gaylord, Inc. In the latter part of 1926 or the early part of 1927, C. W. Gaylord expressed the desire to reacquire the 432 shares of Robert Gaylord, Inc., stock. He wanted the shares for use in connection with a reorganization of his corporation. Petitioner Gaylord agreed to sell the 432 shares for \$300,000, but the offer was not accepted. Thereafter C. W. Gaylord proposed that the previous exchange of 350 shares of Menasha Printing & Carton Co. stock for the 432 shares of the Robert Gaylord, Inc., stock be canceled and that steps be

taken to restore the parties to the position that they would have been in if the exchange had not been made. The "whole arrangement" was to be canceled "as though it had never existed." The offer was accepted and the shares were returned to their original owners, each of the parties paying over any and all dividends which had been received on the respective stocks during the interval.

On October 31, 1927, the Menasha Products Co., such then being the name of the Menasha Printing & Carton Co., was merged with the Marathon Paper Mills Co. In this merger Gaylord received 6,728 shares of the Marathon Paper Mills Co. stock and \$1,038,000 par value of its 5 percent bonds in exchange for his 3,357 shares of common stock of the Menasha Products Co. In December 1929 the Marathon stock was split four shares for one.

On none of the above transactions involving exchanges of stock for stock did petitioner George S. Gaylord report any gain for income tax purposes.

Gaylord, Mrs. Gaylord, and the Gaylord trust reported sales of the following number of shares of common stock in the Marathon Paper Mills Co. in their respective income tax returns for the indicated years:

	Shares Sold			
	1936	1937	1938	1939
Gaylord	4,950	2,800	3,300	2,462
Mrs. Gaylord		2,100	400	500
Gaylord trust	4,000	1,600	1,000	400

The gain reported on these sales was computed on a basis of \$8.21 per share. In determining the deficiencies herein, the respondent determined that the correct basis was \$2,835.42 per share, except as to 100 of the shares sold by Gaylord in 1939. The 100 shares were acquired by purchase in 1933 for \$1,700. The 7,000 shares sold by the trust were the shares contributed by the petitioners to the trust in 1935. The 2,000 shares contributed by Mrs. Gaylord to the trust had [194] been given to her by Gaylord in 1930. According to the respondent's determination, the shares sold by Mrs. Gaylord personally had been given to her by Gaylord in February 1932, and that determination is not disputed.

OPINION

The question here is the basis for determining gain or loss to the petitioners on the sale of stock in the Marathon Paper Mills Co. One hundred of the shares sold by Gaylord in 1939 were purchased by him in 1933 for \$1,700, and as to those shares there is no controversy. The remaining shares were obtained in a four-for-one split of shares received by Gaylord in the merger in 1927 of the Menasha Products Co., formerly Menasha Printing & Carton Co., with the Marathon Paper Mills Co. Both parties have treated that merger as a transaction on which gain or loss was not to be recognized for income tax purposes. Consequently, the basis for gain or loss on the stock and bonds received by Gaylord as a result of that merger is the same as

his basis for the 3,357 shares of Menasha Products Co. stock exchanged for the stock and bonds. There is no dispute between the parties as to the method of allocating basis between the Marathon stock and bonds; neither is there any contention that the basis of the Marathon stock sold by Mrs. Gaylord and the trust is different from the basis of Gaylord himself. As a result, once the basis to Gaylord for the 3,357 shares of Menasha Products Co. stock is fixed, determination of the basis of the Marathon Paper Mills Co. shares sold is a matter of mathematical computation.

From the evidence and the agreed items appearing in the respective computations of the parties, it is apparent that the 3,357 shares of Menasha Products Co. stock represent a portion of the 1,975 shares of Menasha Printing & Carton Co. common shares acquired by Gaylord in the consolidation of Menasha Carton Co. and Menasha Printing Co., and by purchase from Clinedinst, in 1917, plus the 100 percent stock dividend thereon in 1925. It is true that Gaylord did purchase some additional shares from Clinedinst in 1923, but the evidence of record does not show the number of shares so purchased or the price paid. The respondent, however, in the computation which he contends is correct, shows a purchase of 50 shares by Gaylord in 1923, which purchase is not shown by the petitioner in his computation; but the respondent's tabulation likewise shows an offsetting sale of 50 shares not shown in petitioner's tabulation, and the net result

is that the parties in their tabulations are in agreement that the shares of Menasha Products Co. disposed of in the 1927 merger represent the unsold portion of the 1,975 shares acquired by Gaylord in 1917 plus the stock dividend in 1925. [195]

The principal difference in the computations of the parties is in the method of arriving at the basis for the 1,975 shares of common stock of the Menasha Printing & Carton Co. acquired by Gaylord in 1917. The petitioners contend that Gaylord's cost of the said 1,975 common shares and the 410 preferred shares was the sum of the \$152,161.11 paid to Clinedinst and \$350,000 claimed as the fair market value of the 337 shares of Carton Co. stock surrendered by Gaylord in the consolidation, or a total of \$502,161.11. From that amount, they deduct \$20,000 as the amount received on retirement of the preferred stock and claim that the remainder represents the basis for the 1,975 shares of Menasha Printing & Carton Co. common stock. From that figure the petitioners by computation arrive at \$8.21 per share as the basis for the Marathon Paper Mills Co. stock sold by them during the taxable years.

The respondent, on the other hand, treats the \$152,161.11 paid to Clinedinst as the cost of 1,525 shares of the common stock, and \$34,436.50, Gaylord's cost of the 337 shares of Carton Co. stock, as the cost to him of the remaining common shares and the preferred shares of the new corporation. Of the \$34,436.50, he allocates \$10,468.70 as the cost of the preferred shares and treats the remaining

\$23,967.80 as the cost of the common shares received in the consolidation, as distinguished from the 1,525 shares acquired from Clinedinst by purchase. From a total cost of \$176,128.91 for the common shares, he has computed a cost basis for the Marathon shares sold by the petitioners during the taxable years of \$2.835½ per share.

The difficulty with the computations of the parties is that both are wrong in certain respects. The revenue act in force at the time of the 1917 consolidation contained no provision for the non-recognition of gain in the case of corporate reorganizations or the carry-over of the basis of the old stock to the new, and the parties so agree. To the extent then, that Gaylord acquired preferred and common shares of stock of the Menasha Printing & Carton Co. for his 337 shares of Menasha Carton Co. stock in the 1917 consolidation, he realized gain or sustained loss equal to the difference between the fair market value of the shares so acquired, and his cost or other basis for the Carton Co. stock exchanged and the basis of the Carton Co. shares surrendered, adjusted by the gain or loss realized or sustained, become the basis to him of the Menasha Printing & Carton Co. shares acquired. In other words, the basis for the Menasha Printing & Carton Co. shares was the same as their fair market value when acquired. One hundred dollars per share was the price fixed by the parties for the new shares in their dealings with each other. That price was arrived at by taking the value as of the date of consolidation of the combined assets of the consolidated corporations. The peti- [196] tioners

contend that such a value was low and was determined upon by Gaylord because it gave him a financial advantage in the consolidation. They argue that a value represented by capitalization of the current earnings of the businesses at the rate of ten for one would give a much higher value and that this higher value is the fair market value. The only evidence in the record as to the current profits of the two businesses is to be found in the oral testimony of Gaylord. He did not testify from the books and did not attempt to give exact figures, but testified from memory and in what he called "round figures." Furthermore, it is to be noted that the year in which the consolidation occurred was a war year, and in such years business profits are likely to be abnormal and the hazards much greater. Clinedinst had more at stake in the two corporations than Gaylord, and yet he was willing to deal on the basis of value of assets, which gave an indicated value for the stock of the new corporation of \$100 per share. Considering all of the evidence, we have concluded and found that the fair market value of the preferred and common shares of the Menasha Printing & Carton Co. stock acquired by Gaylord in the consolidation was \$100 per share. As for the shares acquired from Clinedinst personally, that was the price actually paid. The facts show that the preferred shares were retired and that only common shares were involved in the 1927 merger with the Marathon Paper Mills Co. It also appears that a 100 percent stock div-

idend was declared by the Menasha Printing & Carlton Co. in 1925 and that Gaylord received such a dividend on the common shares which he still owned, and that the shares subsequently used in the 1927 merger were shares originally held, plus the stock dividend shares received in 1925. Dividing the basis of the original shares with the stock dividend shares, we arrive at a basis of \$50 per share for the 3,357 shares used in the 1927 merger, and computation of the basis for the Marathon Paper Mills Co. shares sold by the petitioners and the trust during the taxable years should be computed therefrom.

Issue 3.—Losses Sustained on Demolition of Building

FINDINGS OF FACT

In March 1938, Gaylord, Mrs. Gaylord, and the Gaylord trust each purchased a one-third interest in a rental property situated in Santa Monica, California, at a total purchase price of \$127,500. The property consisted of a lot 55 feet wide (facing on a street) by 150 feet deep, improved by a one-story brick store building. The building was 55 feet by 80 feet in size, and was divided into three rooms of approximately equal widths. The value of the building was \$15,228.33, which was the portion of the purchase price for the whole property [197] allocable as the cost of the building. Each of the rooms in the building was occupied by separate tenants. At the time of purchase, the petitioners

did not have any intention of demolishing the building or of erecting a new one, but contemplated at most the remodeling of the front, if required by tenants.

One of the tenants, J. Braufman, was conducting a drug business. The lease under which he formerly occupied the premises had expired on March 14, 1938, and he was occupying the premises on a month-to-month basis. The lease of another tenant, Bassett Jewelry Co., expired July 31, 1938, while the lease of the other tenant, Gallen Kamp Stores Co., which operated a shoe store, expired November 30, 1938. About May or June, steps were taken by the petitioner to obtain new leases from the tenants. GallenKamp Stores Co., the first tenant approached, stated that due to expanding business it required more space. While consideration was being given by the petitioners to the remodeling of the building, in order to provide the company with more space, it obtained a lease at a near-by location. Prospective tenants for the GallenKamp space likewise desired more space. Upon investigation, it was found that the partitions in the building were bearing partitions, that to move them would necessitate the complete removal of the roof, which would be almost as costly as to demolish the building and erect a light steel building. In this situation the petitioners decided to obtain agreements from the present tenants extending their occupancy through December 31, 1938. In June 1938 such agreements were made with Braufman and the Bassett Jewelry Co., and

in August with the Gallenkamp Stores Co. A tenant was found who wanted a 27-foot frontage and more depth than the brick building afforded. Two other tenants were found who wanted less frontage than that of the rooms occupied by Braufman and the Bassett Jewelry Co., but more depth.

By late summer or early fall of 1938, the petitioners decided to accept the three prospective tenants, to demolish the brick building, and to erect a new light steel structure on the premises. On January 2, 1939, demolition of the brick building was begun, and a new steel structure was erected. The new building had a frontage of 55 feet, the same frontage as the old brick building, but was 120 feet deep, and cost \$33,000.

In their income tax returns for 1938, Gaylord, Mrs. Gaylord, and the Gaylord trust each took a deduction of \$5,076.11 as their proportionate share of a loss sustained on the brick building. The respondent disallowed the deductions.

OPINION

At the hearing the respondent took the position that the Santa Monica property was acquired by the petitioners and the trust with [198] the intention of razing the building and erecting on the premises a more desirable building and that no part of the purchase price was allocable to the building thereon. On brief, he concedes that this was not the case, and states that all that remains in controversy on this issue is the value of the

building, which he contends was not in excess of \$15,000. The petitioners contend that the value of the building was at least \$15,228.33, the total of the three deductions taken.

On the evidence, we have found that the value of the building at the time of purchase was \$15,228.33 and that such amount was the portion of the total purchase price of the property properly allocable to the building. We accordingly hold for the petitioners on this issue.

Issue 4.—Loss Resulting From Destruction of Pear Orchard

FINDINGS OF FACT

In 1931 Gaylord purchased certain land in Monterey, County, California, bordering on the Carmel River, on which he raised chickens and hogs. In 1935, and principally for the purpose of obtaining a way to get into his ranch from the opposite side of the river, he purchased a 10½-acre tract of land situated on the opposite side and bordering on the river, at a cost of \$900 an acre. Of the tract purchased, about one acre was covered by the river and by a road; one acre was not devoted to any purpose; while on the remainder of the tract were pear and cherry trees. The pear trees had been set out from about 1930 to 1932. Gaylord intended to operate, and did for several years operate, the orchard on a commercial basis, but about 1937 or 1938 the selling price of pears had dropped to \$15.50 to \$16.50 per ton, the lowest price ever

reached in that locality. Operation of the orchard at such prices was unprofitable. During the period of depressed prices approximately one-third of the pear trees in Carmel Valley were taken out.

Since the operation of the pear orchard was not profitable at the prevailing price for pears, and because of his desire to use the land for the growing of alfalfa in connection with his chicken and hog business, Gaylord, in the early part of 1939, removed all of the pear trees except 25. The trees were sawed and used for wood on the ranch. At the time of removal the trees were in full bearing stage and were approaching the years which would normally be their best producing years. Since the removal of the trees the land has been used for the purpose of growing alfalfa.

Ordinarily an acre of pear orchard represents approximately 64 trees. Four hundred and thirty-two pear trees were removed by Gaylord from his property. On his income tax return for 1939, he took a deduction of \$4,320, or 10 per tree, as the amount of loss sustained [199] by reason of the destruction of the pear trees. Of the deduction so claimed, the respondent, in determining the deficiency herein, allowed \$864, or \$2 per tree, and disallowed the remainder.

The loss sustained by Gaylord by reason of the destruction of the pear trees was \$5 per tree, or \$2,160.

OPINION

In 1935 the 10½-acre tract here in question was purchased by Gaylord for \$900 an acre. Most of

the tract was set in pear trees, but the purchase of the land and the orchard was made as a unit and there was no allocation of price between the land and the trees. The orchard was operated commercially for a number of years, but in 1939, due to the drop in the price of pears, Gaylord decided to discontinue the operation of the pear orchard and to convert the land to other uses. As a result, all of the pear trees, with the exception of 25, were destroyed and the land has since been used for the growing of alfalfa in conjunction with his chicken and hog operation adjoining. The evidence from which the basis for determining the loss resulting from the destruction of the pear trees must be determined is sketchy, and in the main represents conclusions drawn by Gaylord from data collected by him with respect to planting, raising, and maintaining a pear orchard and by comparison of his purchase of the pear orchard with two purchases of property in the same locality, one property being a pear orchard and the other having no trees. In the case of those purchases, the land without trees sold for half the price at which the land with the trees was sold. The dates of the sales in those instances were approximately one year from Gaylord's purchase of the property here in question, or one year from the destruction of his pear trees; the record does not show which. Gaylord, in arriving at the deduction claimed, estimated that the number of pear trees destroyed was 432, and the respondent in that connection raises no question.

After considering all of the evidence of record, it is our opinion, and we have found as a fact, that the loss sustained by Gaylord by reason of the destruction of the pear trees in the year 1939 amounted to \$5 per tree, or a total of \$2,160. To that extent, the deduction claimed by him is allowed.

Gaylord assigned as error in his petition the respondent's disallowance of \$467.10 of a deduction of \$517.10 taken in his 1937 return as attorney's fee paid for advice on financial matters. In his answer, the respondent denied error. No evidence was submitted on this issue, and it is not urged on brief. Apparently the issue has been abandoned, and the respondent's disallowance is sustained.

Decisions will be entered under Rule 50. [200]

[Title of Tax Court and Cause.]

MOTION FOR RECONSIDERATION BY THE TAX COURT OF THE UNITED STATES OF ITS DECISION PROMULGATED FEBRUARY 18, 1944, IN THE ABOVE ENTITLED AND REFERRED TO PROCEEDINGS DETERMINING (1) THAT THE INCOME FOR THE YEARS 1936 THROUGH 1939 OF THE TRUST INVOLVED IN SAID PROCEEDINGS WAS TAXABLE TO THE ABOVE NAMED PETITIONERS AND (2) THAT THE BASIS FOR COMPUTING GAIN ON CERTAIN CORPORATE STOCK SOLD BY SAID PETITIONERS AND SAID TRUST DURING THE YEARS 1936 THROUGH 1939 WAS NOT \$8.21 PER SHARE

To the Honorable the Tax Court of the United States and to the Honorable Bolon B. Turner, Judge of said Court:

George S. Gaylord and Gertrude H. Gaylord, the petitioners in the above entitled and referred to proceedings, do hereby move the above entitled court that it reconsider its decision promulgated February 18, 1944, determining

(1) that the income for the years 1936 through 1939 of the trust created by said petitioners and of [201] which they were trustees, involved in these proceedings, was taxable to them for said years, and

(2) That the statutory basis for computing gain on certain shares of the common capital stock of Marathon Paper Mills Company sold by said petitioners and said trust during the years 1936 through 1939 was not \$8.21 per share as contended by said petitioners.

Said motion is made on the records and files in said proceedings and the evidence taken at the hearing in said proceedings held at Los Angeles, California, April 2nd and 3rd, 1943, and on the grounds hereinafter set forth. In what follows herein the petitioner George S. Gaylord is referred to as Mr. Gaylord, the petitioner Gertrude H. Gaylord is referred to as Mrs. Gaylord, the above mentioned decision is referred to as Decision, the pages thereof to the mimeographed copy of said decision furnished by the court to the petitioners, and the transcript of said evidence as Tr.

I.

As to the above referred to determination that the income of the trust referred to in the Commissioner of Internal Revenue's notices of deficiency dated September 17, 1941, and in the respective petitions of said petitioners for redetermination of such deficiency is taxable to them it is respectfully submitted that in so determining the court erred as follows: [202]

(1) The Court disregards the legal effect of the undisputed mutual agreement of Mr. and Mrs. Gaylord for the creation by them of an irrevocable trust.

In its Findings of Fact (Decision, page 4) the court merely states that

"the petitioners decided to set up a trust for the benefit of their two daughters, and in the case of a death of a daughter, then for the benefit of the children of such daughter"

and later in its Opinion (Decision, page 8) adds that

"There is some argument to the effect that the petitioners by mutual promises became obligated, one to the other, to make gifts to their daughters and that the trust was not therefore a voluntary trust within the meaning of section 2280 as amended"

But these mutual promises to create the trust were indisputably proven and, as shown on pages 48 to 50 of Opening Brief of Petitioners, were supported by what in California is a good and valuable consideration and hence constituted a binding contract between the petitioners. It was the contract so formed which changed what would otherwise have been a voluntary trust (as that term is used in equity jurisprudence) into a trust created for a good and valuable consideration. [203]

(2) The Court holds, contrary to California law, "that the trust was a voluntary trust" as that phrase is used in Section 2280 of the Civil Code of California, as amended in 1931.

The court assigns to the word "voluntary" as used in that amendment the meaning "an act of choice, a voluntary act". (Decision, page 8.) This

misapplication is directly contrary to the construction given to the phrase "voluntary trust" in Section 2280 of said Civil Code, as so amended, in the case of Touli vs. Santa Cruz Title Company mentioned on page 8 of the court's decision and discussed at length on pages 43 to 48 of Opening Brief of Petitioners. The Touli case was cited by petitioners not because of any relation or bearing of a deed of trust given as security for repayment of a loan to a trust such as that created by the contract of Mr. and Mrs. Gaylord but for the precise interpretation of the phrase "voluntary trust" as used in the amended Section 2280; for the District Court of Appeal of the State of California in its decision in that case expressly and incontrovertibly holds that such phrase "voluntary trust" means a trust created "freely and without a valuable consideration or legal obligation", and explicitly repudiates any such meaning of the word "voluntary" as that now given it on page 8 of the Tax Court's decision. The expression "voluntary trust", says the District Court of Appeal, "was not used in the broad sense found in Section 2216" of the California Civil Code (where "voluntary trust" is defined as "an obligation arising out of a personal confidence reposed [204] in and voluntarily accepted by one for the benefit of another") "but in the restricted sense of a trust created freely and without a valuable consideration or legal obligation". (20 C. A. (2d) 495 at 497.) In the case at bar, the court has, without reason it is submitted, selected the word

"freely" from its context and has defined "voluntary", as used in the amended Section 2280, by only a part of its true definition and ignored the latter's most important clause.

Further examination of the California reported decision to date reveals that this exact construction by the District Court of Appeal of the phrase "voluntary trust" so used in the amended Section 2280 remains unchanged or unmodified by any other decision of an appellate court of the State of California and constitutes the standing and accepted interpretation of what is meant by that phrase.

As the mutual agreements of Mr. and Mrs. Gaylord, binding each of them to the other to join with each other in the creation of the trust here involved and to contribute to such trust from his and her respective separate estate, constituted a good and valuable consideration under Section 1605 of the California Civil Code and such pertinent judicial determinations as *Aden vs. City of Vallejo* (1903) 139 Cal. 165, 168, such trust was created for and founded upon a valuable consideration or legal obligation. It was not, therefore, a voluntary trust within the meaning of said Section 2280, as amended. [205] To so hold would not "in effect be a rewriting of the California Statute or a making of the trust instrument something it was not" (Decision, page 11) but a simple following of the application and scope of amended Section 2280 as defined by the California courts.

(3) The Court fails to distinguish between the

effect as to the petitioners themselves of their contract to create the trust and the result thereof as concerns their daughters and their issue, who are the beneficiaries of the trust.

Though neither of the petitioners was obligated to make or become a party to such contract and could just as freely and voluntarily have abstained therefrom as have entered upon it, and though the act of each of them in becoming a party to such contract was "an act of choice, a voluntary act", once they did so contract their relationship to each other changed and became one of binding legal obligation as to each other. The result, however, of such an onerous and binding obligation was, as to the beneficiaries of the trust, a gift for they admittedly gave nothing of value. While the petitioners' "purpose and intention was to make gifts to or for the benefit of their two daughters" and the object of the petitioners' mutual agreements was the benefiting of their daughters and their daughters' children without any compensation or value, except love and affection, moving to the petitioners from such beneficiaries, the important thing that should not be overlooked is the fact [206] that the resulting gift was not the act or donation of one person but the separate acts and donations of each of two persons, neither of whom could have been compelled by the other to make such gift. It was the circumstance that each of them did bind himself and herself legally and effectively to the other to make his and her respective contribution to the

trust—did in fact create a legal obligation or burden in favor of his or her co-trustor—which differentiates the trust at bar from a trust where there is but one trustor who uses that means of making a gift and there is no precedent legal obligation between two or more persons for the making of such trust. The result in each case may be the same, that is, the beneficiary receives a gift; but in the case where there is no precedent agreement there is no valuable consideration or legal obligation involved and there is a "voluntary trust" such as is referred to in Section 2280 of the California Civil Code, as amended; while in the other case where there is such an agreement for or founded upon a valuable consideration or legal obligation between the multiple trustors there is present that valuable consideration or legal obligation which takes the trust from out of the scope of the statute mentioned.

In other words, it is not the resulting gift to the daughters and their issue which must be looked to in the case at bar but rather the mutual and reciprocal agreements of their parents, the contract between them, which must be considered. The court in its decision looks only to the resulting gift and overlooks the precedent legal obligation of Mr. Gaylord to [207] Mrs. Gaylord and of Mrs. Gaylord to Mr. Gaylord whose performance or fulfillment brought the gift into being.

(4) The Court holds, contrary to California law, that Section 3399 of the California Civil Code has no application to the trust at bar.

On page 9 of its decision the court says that that section "has no application to a purely voluntary deed" and cites Enos vs. Stewart, 138 Cal. 112, and Robertson vs. Melville, 60 Cal. App. (not Cal.) 354. Again, on page 10 of its decision the court makes reference to "the case of a voluntary deed".

From the supposed non-application of Section 3399 to a "voluntary deed" the court apparently draws the conclusion that the statute is likewise inapplicable to the contract and trust of the petitioners. But this conclusion does not follow. In the first place, the original declaration of trust dated November 7, 1935, is more than a mere deed or conveyance such as that involved in the Enos case or that involved in the Robertson case. Such declaration is also a contract and evidence of a contract between the petitioners, the two trustors therein named, as between themselves and with respect to the beneficiaries provided for in the trust. In the second place, Enos vs. Stewart involved the special situation of a deed of gift from a mother to her daughter in disinheritance of the mother's husband. Though the court in its decision of the case at bar, on pages 9 to 10 thereof, quotes at length from the opinion of [208] Commissioner Cooper in the Enos case that part of the Commissioner's opinion which is omitted from the midst of such quotation is not without its pertinent significance and explains why the court there declined to reform as against the surviving husband heir the deed to the daughter. Quoting the omitted portion:

"The equities of respondent are, at least, equal to those of appellant. It is the dictate of equity and natural justice that the property of a wife dying without issue should go in part to her surviving husband. This was certainly the view of the legislature in enacting our statute of distributions, for in such case it makes the husband the owner of one-half the property. If this be so, then equity would say to appellant that she should allow the respondent his one-half the property."

The Enos case lays down no rule and expresses no principle which in any manner militates against the position of the petitioners in the case at bar that by virtue of Section 3399 of the California Civil Code the trust created by them is and should be in accordance with their original and unchanged understanding considered absolutely irrevocable by either of them or any party whomsoever. Section 3529 of the California Civil Code provides: "That which ought to have been done is to be regarded as done, in favor of him to whom, and against him from whom, performance is due."

In the Robertson case the District Court of Appeal affirmed a judgment reforming the deed there involved in accord- [209] ance with the original intention of the parties to the contract in pursuance of which the deed was executed. Says Presiding Justice Finlayson in the District Court of Appeal's opinion in that case:

"It may be conceded that equity will not reform a purely voluntary deed, for one who accepts another's bounty cannot be heard to say that something else should have been given", citing *Enos vs. Stewart*.

Then, continuing:

"But a valuable consideration, however small, will support a conveyance; and a consideration which will support a conveyance ordinarily is sufficient to entitle the grantee to maintain an action to correct a mutual mistake in the deed."

(60 Cal. App. 354 at 356-357.)

In the case at bar there was under Section 1605 of the California Civil Code and its settled construction, as pointed out in Opening Brief of Petitioners, such a valuable consideration supporting the mutual agreement or contract of the petitioners pursuant to which the gift in trust was made.

(5) In holding inapplicable to the trust in the case at bar Section 3399 of the California Civil Code the Court overlooks the circumstance that it was not any of the beneficiaries of the trust who were before the Court insisting upon the application of that section but it was the two contracting parties themselves, the petitioners herein, both of whom invoked the protection of that section.

There is here no case of hearing "one who accepts [210] another's bounty" saying "that something else should be given." Those who speak here are not donees but donors and contractors, each of whom

was by reason of onerous legal obligation, founded on valuable consideration, bound each to the other, to create the trust and make his or her contribution thereto. It is they who invoke the corrective effect of the section.

(6) The Court in its opinion ignores Section 1640 of the California Civil Code regarding the interpretation of written contracts to express the real intention of the parties (cited on page 53 of Opening Brief of Petitioners) and the provisions of Section 3401 of the same code (cited on page 54 of that brief) which, with Section 3399 above referred to, fully cover the situation of the omission of an express declaration of irrevocability in the original declaration of trust dated November 7, 1935.

As heretofore pointed out, the trust with which this case is concerned is not a mere deed or conveyance but a contract between the petitioners and the beneficiaries, formed pursuant to a precedent onerous contract between the petitioners. But if, wrongfully and contrary to the undisputed facts and circumstances of the case at bar as to the inception of that trust and the subsequent acts and conduct of the petitioners and others with respect thereto, the original declaration of trust be regarded merely as a "voluntary" deed or conveyance, as such term is used in equity jurisprudence, then it still does not follow that it is not subject to reformation or will not be regarded as at all times reformed and reading [211] in accordance

with the positive original intention of the parties thereto. See annotation in 69 A. L. R. at page 423, et seq. There (on page 424) it is declared with respect to the supposed general rule that a court of equity will not reform a conveyance which is voluntary and based on no consideration:

“As is apparent from an examination of the cases which follow, however, no such broad and sweeping rule can be laid down on this subject. Whether or not equity will reform a voluntary conveyance depends upon who seeks the reformation and against whom it is sought, as well as upon other circumstances. For example, it is well settled (see subd. II. c, *infra*) that the grantor is entitled to a reformation of his voluntary deed as against the grantee * * *. In its present form and without radical limitations, the general statement set out above, taken with all its implications, is not only valueless as a guide in the determination of any given case, but is positively misleading.”

(7) The Court completely overlooks the effect of the gift tax returns signed and verified February 3, 1936, by the petitioners and thereafter filed by them, wherein they referred to and identified the trust here involved as an irrevocable trust.

In its decision (on page 4) the court finds that the petitioners filed gift tax returns in which they reported the creation of an irrevocable trust and the transfer thereto of [212] the 7000 shares of Marathon Paper Mills Company stock. The only

reference the court makes in its Opinion to these gift tax returns, in which the trust is declared to be an irrevocable trust, is in a brief paragraph on pages 10 to 11 of its decision, wherein the court discusses petitioners' contention that the respondent is estopped from claiming or asserting that the trust was ever revocable. It should not be overlooked that petitioners plead the making, signing, verification and filing of these gift tax returns and introduced evidence thereon, including a certified photographic copy of each such return, not only for the purpose of showing and proving that the respondent Commissioner was so estopped but also, more importantly, for the purpose of showing and proving a declaration in writing signed and verified by the petitioners within less than two months of the execution of the original declaration of trust dated November 7, 1935 (which was acknowledged by the petitioners December 11, 1935) which subsequent written declaration set forth in the gift tax returns would serve as a correction or amendment of the provisions of the trust as set forth in said declaration dated November 7, 1935, expressly making such trust irrevocable, if the same were not irrevocable from its very inception. This matter is fully discussed on pages 57 to 60 of Opening Brief of Petitioners. Obviously, if the trust as originally entered upon was under any theory revocable by the petitioners or either of them it would also be subject to subsequent change or modification by them, and if they in writing did so

change and modify such trust by declaring the same to be irrevocable it would, in any case, be irrevocable from that time on. Viewed therefore as a subsequent addition, change or modification to the original trust, the formal declaration in writing by the petitioners, set forth in their gift tax returns, that the trust was irrevocable served to make such trust irrevocable in any case from the time of the making of such statement of irrevocability. It has been shown in Opening Brief of Petitioners, nor is it contradicted, that under California law as well as the law of other jurisdictions the instrument creating the trust may consist of any number of documents, which need be neither contemporaneous in time nor have any particular formality, and the trust will speak, as it were, as of and from the time of the making of the last of such instruments completing the trust provisions. That the trust involved in these proceedings was the only trust to which reference was or could be made in the gift tax returns is amply proven by the uncontradicted testimony of Mr. and Mrs. Gaylord given at the hearing. See Tr., pages 52-53, 130-131. In view of their original and unchanged intention to create an irrevocable trust and their understanding that they had formed such a trust, it is immaterial that when they made, signed, verified and filed their gift tax returns, neither Mr. nor Mrs. Gaylord anticipated the need of any additional declaration of irrevocability. The gift tax returns were all a part of the same gen-

eral transaction and in accordance with the same undeviated from intent.

(8) The Court in holding that estoppel is not an issue in this case and in not holding the respondent estopped to claim that the trust was revocable proceeds contrary to law and fact. [214]

Estoppel was another reason for the introduction of the gift tax returns. While it is true that the petitioners contend that respondent had full knowledge of the irrevocable character of the trust as early as 1936 and that he should not now be permitted to claim that it was revocable, it is respectfully submitted that such estoppel was not only sufficiently pleaded in the petitioners' respective petitions herein but further that such issue was definitely before the court at the hearing had in these proceedings and that the case was tried on the theory that among the issues there was this specific issue of estoppel involved. The court cites (Decision, page 11) *Eldorado Oil Works*, 46 B. T. A. 994. But in that case no facts or circumstances were either pleaded in the petition or in evidence before the court on which any estoppel could be founded. Says the court in its opinion there (on page 998):

"The petitioner made representations of fact in its income tax return which were false, were known by the petitioner to be false, and were relied upon by the respondent in allowing deductions which would not otherwise have been allowed."

The court there continues (on page 999) that since "the estoppel was not pleaded and is not even demonstrated, we are unable to consider that there is any issue of estoppel in the case or if there is such an issue that it may be decided to the respondent's [taxpayer's?] advantage". Further in that case, the court emphasizes that even in its brief the taxpayer does not point out precisely what it is that the Commissioner is estopped [215] to deny and declares that "An estoppel must be definite and certain and not vague and uncertain. (46 B. T. A. at page 998 to 999.) So it appears that in the El Dorado Oil Works case not only were there no facts from which an estoppel could arise pleaded but no such facts were proven or offered in evidence. On the contrary, it was the taxpayer which had made in its income tax return representation of facts which were not only false but known to the taxpayer to be false. In the case at bar there was, of course, no misrepresentation whatever in the gift tax returns made, signed, verified and filed by the petitioners early in 1936. In those returns they declared the fact to be that the trust was irrevocable, a fact which was not only believed by them then and there to be true, but which if by reason of some legal technicality it had not theretofore been true was made true by their very fact of so expressing it in writing in those gift tax returns. This significant feature of the case at bar the court has wholly overlooked in its decision.

It is not necessary that for pleading an estoppel

in a proceeding such as this the particular word "estoppel" be used in the petition. All that is required on the part of the petitioning taxpayers, and it is sufficient, is to plead the facts from which the estoppel arises or on which it is based. Petitioner Mr. Gaylord pleaded these facts on page 21 to 23, pages 25 to 26, and page 29, of his petition. Petitioner Gertrude H. Gaylord pleaded the same facts on pages 17 (the sentence at the top of that page commencing on page 16) to 18, 20 to 21 and 23 to 24 of her petition. In each of [216]these petitions there appears, as a part of the statement of the facts as to the creation of the trust, the making, signing, verification and filing of the gift tax returns, and allegations to the effect that the trustors, trustees and beneficiaries of the trust relied at all times upon its irrevocable character, and allegations that each of the daughter beneficiaries of the trust rendered their individual income tax returns of income for the years 1936, 1937, 1938 and 1939, in which returns each of them included her one-half of the net income of the trust for the appropriate year, and paid her individual income taxes on such income. In Mr. Gaylord's petition there were also included allegations as to his payment of the gift tax.

Though the words "estopped" or "estoppel" do not appear, the same if used would amount only to the expression of a conclusion of law and not a statement of fact as required by the rules of this court. Not only were the facts constituting a legal and equitable estoppel so pleaded in both petitions,

but the same were also proven at the hearing and in the exhibits admitted in evidence thereat and now before the court.

The court itself considered that the issue of estoppel was before it. When a photographic copy of Mr. Gaylord's gift tax return was received in evidence there was no objection on respondent's part to its authenticity but counsel for respondent then stated: "if the idea is that a gift tax or payment of a gift tax is material to this case, I object on that ground as to immateriality and irrelevancy. I take it, though, your [217] Honor, that counsel is offering these exhibits because of the statements made therein by Mr. Gaylord in reference to the trust". To which counsel for the petitioners replied "Precisely, statements". Respondent's counsel then said: "On his side of the case, of course, that is pertinent"; as to which the court commented: "I don't think in the light of counsel's opening statement on estoppel and equity you can assume that is the only purpose of the gift tax return" (Tr., pages 55-56.)

Not only are the income tax returns of the daughter beneficiaries for the years involved in evidence but as well the income tax returns of Mr. and Mrs. Gaylord for those years and their fiduciary returns for the trust for the same years; there having been filed with their first fiduciary return for that trust in the early part of the year 1936 a copy of the original declaration of trust dated November 7, 1935.

The Commissioner of Internal Revenue had at all times all of the facts and circumstances of the case before him and must be presumed to know that under the law, even though the declaration of trust originally contained no expression of irrevocability, such expression was properly and adequately supplied in the gift tax returns filed with him referring to this particular trust and to none other, and he has had at all times full knowledge that all parties to said trust, trustors, trustees and beneficiaries, were acting and conducting themselves and relying on the basis of the trust's irrevocability and were paying out money and value on that basis and changing [218] their position accordingly, and that no gift tax need have been paid by Mr. Gaylord in 1936 or at any time if the trust had not been irrevocable. But the Commissioner kept silent, received the benefits of his silence and raised no question as to the irrevocability of the trust until years had passed and he initiated the present controversy. In justice and in equity, in view of all of the circumstances and facts surrounding the conduct of all parties to this trust, the Commissioner should be estopped to claim or assert that the trust ever was revocable, at least, at any rate, at any time from and after making and signing of the gift tax returns.

(9) The Court overlooks evidence before it, both in the declaration of trust dated November 7, 1935, and of the acts and conduct of the trustees, that the trust was intended to be operative under laws of

jurisdictions other than California, in which other jurisdictions the trust even as set forth in said declaration, has always been irrevocable.

The Court in its decision makes no mention of the fact that The Northern Trust Company, of Chicago, Illinois, a corporation foreign to California, was named in the original declaration of trust as a successor trustee of the trust therein created and provided for, nor of the fact, in evidence, that following the sale of the shares of Marathon stock none of the proceeds thereof were ever kept in or [219] came to California except such thereof as were invested in California real estate.

(10) The Court erred in not holding the income derived from the Texas real property to have been income of an irrevocable trust.

Though the Court on page 5 of its decision mentions the fact that "In 1938 the trustees made certain purchases of real estate situate in Texas, totaling about \$90,000.00, and in connection therewith had the trust instrument recorded in four counties of that state", the court nowhere in its decision discloses that it considered in any manner the effect of such investments and recording in a state where the trust was indubitably irrevocable upon the character or ownership of the income derived from property there located. This matter is discussed on pages 62 to 64 of Opening Brief of Petitioners. It is hornbook law that as to real property the law of the situs governs and that a trust of real property is consequently governed by the law of its situs. This being so, none of the income derived

from the Texas real property purchased and owned by the trust could be chargeable to the petitioners, but the same, having been distributed by the trustees to the beneficiaries of the trust, would have to be accounted for by them.

II.

As to the above referred to determination that the statutory basis for computing gain on the common capital stock of Marathon Paper Mills Company was not \$8.21 per share, as [220] contended by the petitioners, it is respectfully submitted that in so determining the court erred as follows:

(1) The Court disregards the positive testimony of the petitioner Mr. Gaylord that the consolidation of Menasha Carton Company and Menasha Printing Company was effected on the basis of the respective appraised values of the physical assets plus the book values of the quick assets of each of the two corporations used not as an indication or determination of real or actual values involved but rather as a standard or measuring stick of Mr. Gaylord's and Mr. Clinedinst's relative and respective interests.

In its findings the court does mention the fact that "Determination of the value of the stock of the two old corporations through the capitalization of current earnings at ten times such earnings (regarded by Gaylord as a conservative rate) would have indicated a substantially higher value for the stock of the old corporations than was indicated on the basis of value of assets". (Decision, page 12) But though the court may be correct in stating that

"the basis for the Menasha Printing & Carton Company shares was the same as their fair market value when acquired" (Decision, page 18) it is in error, it is submitted, when it further states that "one hundred dollars per share was the price fixed by the parties for the new shares in their dealings with each other", and that "That price was arrived at by taking the value as of [221] the date of consolidation of the combined assets of the consolidated corporations". (Decision, pages 18 to 19.) While it is true that petitioners contend that such value was too low and that "a value represented by capitalization of the current earnings of the businesses at the rate of ten for one would give a much higher value and that this higher value is the fair market value" (Decision, page 19) this contention is based on the uncontradicted testimony of Mr. Gaylord who testified as follows:

"there was a very definite consideration besides what appeared on the books. The profits of the Menasha Carton Company for the first seven months of 1917 were \$56,000, which on a 12-months' basis would be \$96,000 made on assets of net worth of \$186,000. The Printing Company made the first six months of 1917 \$187,000. These, of course, are all in round figures. The combined profits at the end of the year 1917, that is, first operated separately for the six months of 1917, plus the profits for the new company which was a combination of the two old ones, was \$315,000 of net profits for the

year 1917." (Tr. page 83) * * * There was one other consideration, and a very important one to me, most important. If we had consolidated these two companies on the basis of earnings, the most conservative of which might be called ten times earnings as the value of the stock, and by my prearranged [222] agreement with Mr. Clinedinst whereby I was to acquire 40 per cent of the common stock less what I would get by virtue of my Menasha Carton Company, put into the combination, I would have been signing a note not for \$152,000 but for closer to \$1,000,000, which made quite a different consideration to me, and there comes in the intangible consideration, namely, that Mr. Clinedinst was satisfied that I was the man to run the business and I was the one that dictated the terms of the consolidation, and I dictated them, of course, as much to my advantage as I could.

"Consequently, we took the assets as the measuring stick, not the earnings power, and for that reason alone, so that when we got through instead of having \$600 a share value in the Menasha Printing and Carton Company stock, in round figures, as would have been the case if we had used ten for one earning capacity to place a valuation on that stock, we had consequently a very low valuation, which was all, of course, to my financial advantage at that time." (Tr., page 85.)

In other words, the appraised values of the physical

assets and book values of the quick assets furnished merely a measuring stick for the respective proportions in which Mr. Clinedinst and Mr. Gaylord were to participate in the stock of the new corporation, Menasha Printing & Carton Company, but not as any indication of the real values involved on either [223] side.

It is manifest that, considering its earnings at the time of the consolidation, Mr. Gaylord's shares of the Menasha Carton Company which were involved had a value much higher than that indicated by the values of the physical assets and the book value of the quick assets of that company, which was a going concern. To hold otherwise and limit fair market value to the two elements of physical value and book value of quick assets is to take a very unrealistic view of the situation. While it is true that the only evidence in the record as to the current profits of the two businesses involved in this consolidation is to be found in the oral testimony of Mr. Gaylord, there is no reason why he should be disbelieved nor was his testimony in any manner impeached or contradicted. Clinedinst's Menasha Printing Company also had very large profits, and considering the fact that two profitable businesses were to be combined, his and Mr. Gaylord's, there was every reason why both these principal owners and parties interested should have been willing in dealing with each other on the bases of value of assets, to use as a formula for the consolidation the totals of the respective values of

physical assets and book values of quick assets of each company entering into the consolidation not as an indicator of real or actual or fair value but as a measure of proportion for stock participation in the new consolidated company. While the consolidation took place in 1917, a war year, there is nothing in the evidence to indicate that the business profits [224] of either of the companies was abnormal or the hazards greater than at other times. There is nothing in the record to contradict Mr. Gaylord's testimony (Tr., page 202) that the fair market value of his interest, his stock in the Menasha Carton Company, which he contributed to the reorganization of it and Menasha Printing Company into Menasha Printing & Carton Company was \$350,000.00 as of July 1, 1917.

(2) The Court erred in finding that in 1922 or 1923 Mr. Gaylord purchased the remaining interest of Clinedinst in the Menasha Printing & Carton Company.

This finding is without evidence in the record.

(3) The Court overlooks the fact that under Section 202 (a) of the 1926 Act the cost to Mr. Gaylord of the 352 shares of Menasha Printing & Carton Company stock which he received from his brother C. W. Gaylord in 1927 in exchange for 432 shares of Robert Gaylord Incorporated, was the market or true or actual value of such shares of Menasha Printing and Carton Company in August, 1927.

Though, as found by the court (Decision, pages 14 to 15) the "whole arrangement" whereby Mr. Gay-

lord acquired from his brother C. W. Gaylord in 1925 the above mentioned shares of Robert Gaylord, Incorporated, in exchange for 350 shares of Menasha Printing & Carton Company stock, was, as between them, cancelled "as though it had never existed" the transaction was, nevertheless, taxable, though not at the [225] time so considered by the parties thereto. The then value of the above mentioned 352 shares of Menasha Printing & Carton Company was \$200,762.21. (Tr., page 81; Exhibit H to petitions.)

(4) The Court apparently treats the \$152,161.11 paid to Clinedinst as the cost of 1525 shares of the common stock of the Menasha Printing & Carton Company.

But the evidence shows that his figure of \$152,161.11 was not the sole cost of such shares. This amount was a part of the whole transaction for the consolidation of the Menasha Printing Company with the Menasha Carton Company and not separately and distinctly a payment for such common shares. What has been hereinbefore pointed out as to the method of formula used in effecting the consolidation and determining the respective values

involved for participation of Mr. Clinedinst and Mr. Gaylord therein applies here.

Respectfully submitted,

THOMAS A. J. DOCKWEILER

whose address is 1035 I. N. Van Nuys Building,
210 West Seventh Street, Los Angeles, California.

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whose post office address is 215 West Sixth Street,
Los Angeles, California.

Attorneys for said petitioners

[Endorsed]: T.C.U.S. Filed Mar. 17, 1944.

[Endorsed]: T.C.U.S. Denied Mar. 18, 1944.

[226]

The Tax Court of the United States

Docket No. 109273

GERTRUDE H. GAYLORD,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

RESPONDENT'S COMPUTATION FOR
ENTRY OF DECISION

The attached proposed computation is submitted, on behalf of the respondent, to the Tax Court of the United States, in compliance with its opinion determining the issues in this proceeding.

This computation is submitted in accordance with the opinion of the Court, without prejudice to the respondent's right of contest the correctness of the decision entered herein by the Court, pursuant to the statutes in such cases made and provided.

(Signed) J. P. WENCHEL, BHN

Chief Counsel, Bureau of Internal Revenue

Of Counsel:

B. H. NEBLETT,

Division Counsel.

HAROLD D. THOMAS,

B. M. COON,

Special Attorneys, Bureau of Internal Revenue.

BMC/mm 5/10/44 [227]

C-TS:PD

LA:KD

TC-Recomp.

RECOMPUTATION STATEMENT

In re: George S. Gaylord
639 Rosemont Avenue
Pasadena, California

Docket No. 109138

INCOME TAX LIABILITY

Year	Tax Liability	Tax Assessed	Deficiency
1936	\$27,476.91	\$ 9,650.54	\$17,826.37
1937	21,685.91	9,658.84	12,029.07
1938	14,957.95	6,746.10	8,211.85
1939	15,548.08	6,327.02	9,221.06
Total	\$79,668.85	\$32,380.50	\$47,288.35

The attached schedules of income tax liabilities have been made under Rule 50 pursuant to the opinion of The Tax Court of the United States promulgated February 18, 1944, wherein it was held.

(a) That income of the Gaylord trust was taxable to the grantors, petitioner and his wife, during the taxable years 1936 through 1939, as contended by the respondent.

(b) That the basis for computing gain or loss on certain shares of corporate stock sold by petitioner and the trust be revised.

(c) That the amounts deducted by the petitioners, George S. and Gertrude H. Gaylord and trust, as losses sustained on the removal of a building, are allowable.

(d) That an additional loss is allowable with respect to the destruction of a pear orchard.

The respondent was sustained in the disallowance of a deduction of \$467.10, claimed in the year 1937 as an attorney's fee for advice on financial matters. The issue with respect to the partial disallowance of a loss for the year 1939, claimed to have resulted from the destruction by storm of ornamental trees, was abandoned at the hearing.

Taxable Year Ended December 31, 1936

Schedule 1

Net Income

Net income disclosed by the statutory notice of deficiency dated September 17, 1941.....	\$ 91,806.12
As adjusted in accordance with the Court's opinion..	91,788.93
Difference (decrease)	\$ 17.19

Schedule 2

Explanation of Adjustment

The Tax Court has held that 3357 shares of Menasha Carton Company stock, represented in the 1927 merger with Marathon Paper Mills Company, had a basis of \$50.00 a share, and that computation of the basis for Marathon Paper Mills Company shares sold by petitioner during the taxable years 1936 through 1939 should be computed therefrom. When recomputed upon such basis, the latter stock has a value of \$0.00734 a share less at January 1, 1936, than was determined in the statutory notice as disclosed by Exhibit A, attached hereto.

Accordingly, capital gain on sales of the aforesaid stock has been decreased as follows:

	Reflected in Individual Income	Reflected in Trust Income
4950 shares at \$0.00734.....	\$36.33	
4000 shares at \$0.00734.....		\$29.36
Taken into account at 30%.....	\$10.90	\$ 8.81
Share in trust, 5/7.....		\$ 6.29
Total decrease in capital gain....	\$17.19	

Schedule 3
Computation of Tax

Net income, schedule 1	\$ 91,788.93
Less: Personal exemption	\$2,500.00
Credit for dependent	400.00
	<hr/>
Surtax net income	\$ 88,888.93
Less: Earned income credit	300.00
	<hr/>
Balance subject to normal tax.....	\$ 88,588.93
	<hr/>
Normal tax at 4% on \$88,588.93	\$ 3,543.56
Surtax on \$88,888.93	23,933.35
	<hr/>
Total tax	\$ 27,476.91
Tax assessed, account No. 200178	9,650.54
	<hr/>
Deficiency	\$ 17,826.37
	<hr/>
	[229]

Taxable Year Ended December 31, 1937

Schedule 4
Net Income

Net income disclosed by the statutory notice of deficiency dated September 17, 1941	\$ 81,159.49
As adjusted in accordance with the Court's opinion	81,150.81
	<hr/>
Difference (decrease)	\$ 8.68
	<hr/>

Schedule 5

Explanation of Adjustment

Refer to explanation in schedule 2 of this statement. Capital gain has been decreased as follows:

	Reflected in Indi- vidual Income	Reflected in Trust Income
2800 shares at \$0.00734.....	\$20.55	
	<hr/>	
1600 shares at \$0.00734.....		\$11.74
		<hr/>
Taken into account at 30%.....	\$ 6.17	\$ 3.52
	<hr/>	<hr/>
Share in trust, 5/7.....		\$ 2.51
		<hr/>
Total decrease in capital gain....		\$ 8.68
		<hr/>

Schedule 6

Computation of Tax

Net income, schedule 4	\$ 81,150.81
Less: Personal exemption	\$2,500.00
Credit for dependent	400.00
	2,900.00
	<hr/>
Surtax net income	\$ 78,250.81
Less: Earned income credit	300.00
	<hr/>
Balance subject to normal tax.....	\$ 77,950.81
	<hr/>
Normal tax at 4% on \$77,950.81.....	\$ 3,118.03
Surtax on \$78,250.81	18,577.88
	<hr/>
Total tax	\$ 21,695.91
Less: Income tax paid at source	10.00
	<hr/>
Net tax liability	\$ 21,685.91
Tax assessed, account No. 809480	9,656.84
	<hr/>
Deficiency	\$ 12,029.07
	<hr/>

Taxable Year Ended December 31, 1938

Schedule 7

Net Income

Net income disclosed by the statutory notice of deficiency dated September 17, 1941.....	\$ 75,146.75
As adjusted in accordance with the Court's opinion	66,430.12
Difference (decrease)	\$ 8,716.63
Reductions in net income:	
(a) Income from trust decreased	\$ 3,628.41
(b) Long term capital gain decreased	12.11
(c) Loss on demolition of building (reversed).....	5,076.11
Total	\$ 8,716.63

Schedule 8

Explanation of Adjustments

(a) Income from the Gaylord Trust has been adjusted in accordance with the Court's opinion to the effect that long-term capital gain has been reduced for change in stock basis, and the loss on demolition of a building in Santa Monica, California, has been allowed in the amount of \$5,076.11.

The adjustment was determined as follows:

Net income of trust, statutory notice.....	\$ 25,304.53
Less: Loss allowable (Court's opinion)....	\$5,076.11
*Long-term capital gain reduced (1000 shares at \$0.00734—taken into account at 50%)	3.67 5,079.78
Net income of trust as adjusted.....	\$ 20,224.75
Petitioner's portion, 5/7	\$ 14,446.25
Previously included	18,074.66
Decrease	\$ 3,628.41

*See explanation in schedule 2, herewith.

(b) Long-term capital gain on the sale of 3300 shares of Marathon Paper Mills Company common stock has been reduced by reason of an increase in cost basis from \$2.83542 to \$2.84276 a share, or \$24.22, of which amount, 50% has been taken into account. Refer to explanation in schedule 2.

(c) The Tax Court has held that the demolition loss of \$5,076.11 claimed by the petitioner in his return is allowable. A like adjustment has been made for the Gaylord trust. See explanation (a) of this schedule. [231]

Schedule 9 Computation of Alternative Tax

Net income, schedule 7	\$ 66,430.12
Less: Net long-term capital gain (schedule 10).....	56,293.94
Ordinary net increase	\$ 10,136.18
Less: Personal exemption	2,500.00
Surtax net income	\$ 7,636.18
Less: Earned income credit	300.00
Balance subject to normal tax.....	\$ 7,336.18
Normal tax at 4% on \$7,336.18	\$ 293.45
Surtax on \$7,636.18	161.81
Partial tax	\$ 455.26
Add: 30% of net long-term capital gain.....	16,888.18
Total alternative tax	\$ 17,343.44

Computation of Tax Under Sections 11 and 12

Net income, schedule 7	\$ 66,430.12
Less: Personal exemption	2,500.00
Surtax net income	\$ 63,930.12
Less: Earned income credit	300.00
Balance subject to normal tax	\$ 63,630.12
Normal tax at 4% on \$63,630.12.....	\$ 2,545.20
Surtax on \$63,930.12	12,412.75
Total tax under sections 11 and 12.....	\$ 14,957.95
Alternative tax	\$ 17,343.44
Tax liability (lesser amount)	\$ 14,957.95
Tax assessed, account No. 805280.....	6,746.10
Deficiency	\$ 8,211.85

Schedule 10
Long-term Capital Gain

	Individual	Trust-5/7	Total
Reported in return	\$36,731.48	\$ 8,789.64	\$45,521.12
Increase, statutory notice	8,868.06	1,919.49	10,787.55
Decrease, schedule 8(a) and (b)	(12.11)	(2.62)	(14.73)
Total	\$45,587.43	\$10,706.51	\$56,293.94

[232]

Taxable Year Ended December 31, 1939

Schedule 11

Net Income

Net income disclosed by the statutory notice of deficiency dated September 17, 1941.....	\$ 70,922.89
As adjusted in accordance with the Tax Court's opinion	69,617.17
<hr/>	<hr/>
Difference (decrease)	\$ 1,305.72
<hr/>	<hr/>
Reductions in net income:	
(a) Income from trust decreased	\$ 1.05
(b) Long-term capital gain decreased	8.67
(c) Farm loss increased	1,296.00
<hr/>	<hr/>
Total	\$ 1,305.72
<hr/>	<hr/>

Schedule 12

Explanation of Adjustments

(a) and (b) Refer to explanation in schedule 2 of this statement. Long-term capital gains have been decreased as follows:

	Reflected in In- dividual Income	Reflected in Trust Income
2362 shares at \$0.00734.....	\$17.34	
<hr/>	<hr/>	
400 shares at \$0.00734.....		\$2.94
<hr/>		<hr/>
Taken into account at 50%.....	\$ 8.67	\$1.47
<hr/>	<hr/>	<hr/>
Share in trust, 5/7.....		\$1.05
<hr/>		<hr/>

(c) The Tax Court has held that the farm loss sustained by petitioner on the destruction of 432 pear trees, was \$5.00 a tree, or a total of \$2,160.00. In his return, the petitioner claimed \$4,320.00 for

such loss, of which amount \$864.00 was allowed in the statutory notice. The additional amount of \$1,296.00 has therefore been allowed.

Schedule 13

Computation of Tax Under Sections 11 and 12

Net income, schedule 11	\$ 69,617.17
Less: Personal exemption	2,500.00
Surtax net income	\$ 67,117.17
Less: Earned income credit	300.00
Balance subject to normal tax	\$ 66,817.17
Normal tax at 4% on \$66,817.17	\$ 2,672.69
Surtax on \$67,117.17	13,655.70
Total tax under sections 11 and 12	\$ 16,328.39
	[233]

Computation of Alternative Tax

Net income, schedule 11	\$ 69,617.17
Less: Long-term capital gain (schedule 14)	40,330.43
Ordinary net income	\$ 29,286.74
Less: Personal exemption	2,500.00
Surtax net income	\$ 26,786.74
Less: Earned income credit	300.00
Balance subject to normal tax	\$ 26,486.74
Normal tax at 4% on \$26,486.74	\$ 1,059.47
Surtax on \$26,786.74	2,389.48
Partial tax	\$ 3,448.95
Add: 30% on long-term capital gain	12,099.13
Total alternative tax	\$ 15,548.08

Total tax liability (lesser amount).....	\$ 15,548.08
Tax assessed, account No. 852592	6,327.02
Deficiency	\$ 9,221.06
	=====

Schedule 14
Long-term Capital Gain

	Individual	Trust-5/7	Total
Reported in return	\$29,694.55	\$3,969.91	\$33,664.46
Increase, statutory notice	5,907.89	767.80	6,675.69
Decrease, schedule 11(a) and (b)	(8.67)	(1.05)	(9.72)
Total	<u>\$35,593.77</u>	<u>\$4,736.66</u>	<u>\$40,330.43</u>
	=====	=====	=====

[234]

EXHIBIT A

**Marathon Paper Mills Company Bond and Stock
Received October 31, 1927 in Exchange for
3,357 Shares of Menasha Carton Company
Stock**

Value of 3,357 shares at \$50.00 a share (Court's opinion)	\$167,850.00
6,795 shares common stock for 46.033% of \$167,850.00	\$ 77,266.39
Basis per share of stock.....	\$11.37106
10/31/27 (767) shares sold at	\$11.37106 (8,721.60)
6028 shares at	\$11.37106 \$ 68,544.79
12/ 2/29 18084 shares for 4 for 1 split-up	0
24112 shares at	\$ 2.84276 \$ 68,544.79

2/9/32	(5000) shares gift to Gertrude	
	H. Gaylord at.....	\$ 2,84276 (14,213.80)
	19,112 shares at	\$ 2,84276 \$ 54,330.99
11/35	(700) shares sold at.....	\$ 2,84276 (1,989.93)
	18412 shares at	\$ 2,84276 \$ 52,341.06
11/7/35	(5000) shares to Gaylord	
	Trust at	\$ 2,84276 (14,213.80)
	13412 shares remaining at.....	\$ 2,84276 \$ 38,127.26
	Basis per one share of stock	\$ 2,84276
	Basis per share, statutory notice.....	2.83542
	Increase in basis per share	\$ 0.00734

[Endorsed] T.C.U.S. Filed May 17, 1944. [235]

The Tax Court of the United States

Docket No. 109138

GEORGE S. GAYLORD,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

RESPONDENT'S REVISED COMPUTATION
FOR ENTRY OF DECISION

The attached proposed revised computation is submitted, on behalf of the respondent, to the Tax Court of the United States, in compliance with its opinion determining the issues in this proceeding.

This revised computation is submitted in accordance with the opinion of the Court, without prejudice to the respondent's right to contest the correctness of the decision entered herein by the Court, pursuant to the statutes in such cases made and provided.

(Signed) J. P. WENCHEL, BHN

Chief Counsel, Bureau of Internal Revenue

Of Counsel:

B. H. NEBLETT,

Division Counsel.

EARL C. CROUTER,

B. M. COON,

Special Attorneys, Bureau of Internal
Revenue. [236]

RECOMPUTATION STATEMENT

In re: George S. Gaylord

639 Rosemont Avenue
Pasadena, California

Docket No. 109138

Income Tax Liability

Year	Tax Liability	Tax Assessed	Deficiency
1936	\$27,476.91	\$ 9,650.54	\$17,826.37
1937	21,685.91	9,656.84	12,029.07
1938	14,957.95	6,746.10	8,211.85
1939	15,533.84	6,327.02	9,206.82
Total	\$79,654.61	\$32,380.50	\$47,274.11

The attached schedules of income tax liabilities have been made under Rule 50 pursuant to the opinion of The Tax Court of the United States promulgated February 18, 1944, wherein it was held:

- (a) That income of the Gaylord trust was taxable to the grantors, petitioner and his wife, during the taxable years 1936 through 1939, as contended by the respondent.
- (b) That the basis for computing gain or loss on certain shares of corporate stock sold by petitioner and the trust be revised.
- (c) That the amount deducted by the petitioners, George S. and Gertrude H. Gaylord and trust, as losses sustained on the removal of a building, are allowable.
- (d) That an additional loss is allowable with respect to the destruction of a pear orchard.

The respondent was sustained in the disallowance of a deduction of \$467.10, claimed in the year 1937 as an attorney's fee for advice on financial matters. The issue with respect to the partial disallowance of a loss for the year 1939, claimed to have resulted from the destruction by storm of ornamental trees, was abandoned at the hearing.

Taxable Year Ended December 31, 1936

Schedule 1

Net Income

Net income disclosed by the statutory notice of deficiency dated September 17, 1941.....	\$ 91,808.12
As adjusted in accordance with the Court's opinion	91,788.93
Difference (decrease)	\$ 17.19

Schedule 2

Explanation of Adjustment

The Tax Court has held that 3357 shares of Menasha Carton Company stock, represented in the 1927 merger with Marathon Paper Mills Company, had a basis of \$50.00 a share, and that computation of the basis for Marathon Paper Mills Company shares sold by petitioner during the taxable years 1936 through 1939 should be computed therefrom. When recomputed upon such basis, the latter stock has a value of \$0.00734 a share less at January 1, 1936, than was determined in the statutory notice as disclosed by Exhibit A, attached hereto.

Accordingly, capital gain on sales of the aforesaid stock has been decreased as follows:

	Reflected in Individual Income	Reflected in Trust Income
4950 shares at \$0.00734.....	\$36.33	
4000 shares at \$0.00734.....		\$29.36
Taken into account at 30%.....	\$10.90	\$ 8.81
Share in trust, 5/7.....		\$ 6.29
Total decrease in capital gain....		\$17.19

Schedule 3
Computation of Tax

Net income, schedule 1	\$ 91,788.93
Less: Personal exemption	\$2,500.00
Credit for dependent	400.00
	2,900.00
Surtax net income	\$ 88,888.93
Less: Earned income credit	300.00
Balance subject to normal tax	\$ 88,588.93
Normal tax at 4% on \$88,588.93.....	\$ 3,543.56
Surtax on \$88,888.93	23,933.35
Total tax	\$ 27,476.91
Tax assessed, account No. 200178.....	9,650.54
Deficiency	\$ 17,826.37
	[238]

Taxable Year Ended December 31, 1937

Schedule 4
Net Income

Net income disclosed by the statutory notice of deficiency dated September 17, 1941.....	\$ 81,159.49
As adjusted in accordance with the Court's opinion....	81,150.81
Difference (decrease)	\$ 8.68

Schedule 5
Explanation of Adjustment

Refer to explanation in schedule 2 of this statement. Capital gain has been decreased as follows:

	Reflected in In- dividual Income	Reflected in Trust Income
2800 shares at \$0.00734.....	\$20.55	
	<hr/>	
1600 shares at \$0.00734.....		\$11.74
		<hr/>
Taken into account at 30%.....	\$ 6.17	\$ 3.52
	<hr/>	
Share in trust, 5/7.....		\$ 2.51
		<hr/>
Total decrease in capital gain		\$ 8.68

Schedule 6
Computation of Tax

Net income, schedule 4	\$ 81,150.81
Less: Personal exemption	\$2,500.00
Credit for dependent	400.00
	<hr/>
Surtax net income	\$ 78,250.81
Less: Earned income credit	300.00
	<hr/>
Balance subject to normal tax	\$ 77,950.81
	<hr/>
Normal tax at 4% on \$77,950.81	\$ 3,118.03
Surtax on \$76,250.81	18,577.88
	<hr/>
Total tax	\$ 21,695.91
Less: Income tax paid at source	10.00
	<hr/>
Net tax liability	\$ 21,685.91
Tax assessed, account No. 809480	9,656.84
	<hr/>
Deficiency	\$ 12,029.07

Taxable Year Ended December 31, 1938

Schedule 7

Net Income

Net income disclosed by the statutory notice of deficiency dated September 17, 1941.....	\$ 75,146.75
As adjusted in accordance with the Court's opinion	66,430.12

Difference (decrease)	\$ 8,716.63

Deductions in net income:	
(a) Income from trust decreased	\$ 3,628.41
(b) Long-term capital gain decreased.....	12.11
(c) Loss on demolition of building (reversed).....	5,076.11

Total	\$ 8,716.63

Schedule 8

Explanation of Adjustments

(a) Income from the Gaylord Trust has been adjusted in accordance with the Court's opinion to the effect that long-term capital gain has been reduced for change in stock basis, and the loss on demolition of a building in Santa Monica, California, has been allowed in the amount of \$5,076.11.

The adjustment was determined as follows:

Net income of trust, statutory notice.....	\$ 25,304.53
Less: Loss allowable (Court's opinion)....	\$5,076.11

*Long-term capital gain reduced (1000 shares at \$0.00734—taken into account at 50%.....	3.67 5,079.78

Net income of trust as adjusted.....	\$ 20,224.75

Petitioner's portion 5/7	\$ 14,446.25
Previously included	18,074.66

Decrease	\$ 3,628.41

*See explanation in schedule 2, herewith.

(b) Long-term capital gain on the sale of 3300 shares of Marathon Paper Mills Company common stock has been reduced by reason of an increase in cost basis from \$2.83542 to \$2.84276 a share, or \$24.22, of which amount, 50% has been taken into account. Refer to explanation in schedule 2.

(c) The Tax Court has held that the demolition loss of \$5,076.11 claimed by the petitioner in his return is allowable. A like adjustment has been made for the Gaylord trust. See explanation (a) of this schedule. [240]

Schedule 9 Computation of Alternative Tax

Net income, schedule 7	\$ 66,430.12
Less: Net long-term capital gain (schedule 10).....	56,293.94
Ordinary net income	\$ 10,136.18
Less: Personal exemption	2,500.00
Surtax net income	\$ 7,636.18
Less: Earned income credit	300.00
Balance subject to normal tax.....	\$ 7,336.18
Normal tax at 4% on \$7,336.18.....	\$ 293.45
Surtax on \$7,636.18	161.81
Partial tax	\$ 455.26
Add: 30% of net long-term capital gain	16,888.18
Total alternative tax	\$ 17,343.44

Computation of Tax Under Section 11 and 12

Net income, schedule 7.....	\$ 66,430.12
Less: Personal exemption	2,500.00
Surtax net income	\$ 63,930.12
Less: Earned income credit	300.00
Balance subject to normal tax	\$ 63,630.12
Normal tax at 4% on \$63,630.12.....	\$ 2,545.20
Surtax on \$63,930.12	12,412.75
Total tax under sections 11 and 12.....	\$ 14,957.95
Alternative tax	\$ 17,343.44
Tax Liability (lesser amount)	\$ 14,957.95
Tax assessed, account No. 805280	6,746.10
Deficiency	\$ 8,211.85

Schedule 10
Long-Term Capital Gain

	Individual	Trust-5/7	Total
Reported in return	\$36,731.48	\$ 8,789.64	\$45,521.12
Increase, statutory notice	8,868.06	1,919.49	10,787.55
Decrease, schedule 8(a) and (b)	(12.11)	(2.63)	(14.73)
Total	\$45,587.43	\$10,706.51	\$56,293.94
		[241]	

Taxable Year Ended December 31, 1939

Schedule 11

Net Income

Net income disclosed by the statutory notice of deficiency dated September 17, 1941	\$ 70,922.89
As adjusted in accordance with the Tax Court's opinion	69,617.17
<hr/>	<hr/>
Difference (decrease)	\$ 1,305.72
<hr/>	<hr/>
Reductions in net income:	
(a) Income from trust decreased	\$ 1.05
(b) Long-term capital gain decreased.....	8.67
(c) Farm loss increased	1,296.00
<hr/>	<hr/>
Total	\$ 1,305.72
<hr/>	<hr/>

Schedule 12
Explanation of Adjustments

(a) and (b) Refer to explanation in schedule 2 of this statement. Long-term capital gains have been decreased as follows:

	Reflected in Individ- ual Income	Reflected in Trust Income
2362 shares at \$0.00734.....	\$17.34	
<hr/>	<hr/>	
400 shares at \$0.00734.....		\$ 2.94
<hr/>		<hr/>
Taken into account at 50%.....	\$ 8.67	\$ 1.47
<hr/>	<hr/>	<hr/>
Share in trust, 5/7.....		\$ 1.05
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(c) The Tax Court has held that the farm loss sustained by petitioner on the destruction of 432 pear trees was \$5.00 a tree, or a total of \$2,160.00. In his return the petitioner claimed \$4,320.00 for

such loss, of which amount \$864.00 was allowed in the statutory notice. The additional amount of \$1,296.00 has therefore been allowed.

Schedule 13

Computation of Tax Under Sections 11 and 12

Net income, schedule 11	\$ 69,617.17
Less: Personal exemption	2,500.00
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Surtax net income	\$ 67,117.17
Less: Earned income credit	300.00
<hr/>	
Balance subject to normal tax.....	\$ 66,817.17
<hr/>	
Normal tax at 4% on \$66,817.17.....	\$ 2,672.69
Surtax on \$67,117.17	13,655.70
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Total tax under sections 11 and 12.....	\$ 16,328.39
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[242]	

Computation of Alternative Tax

Net income, schedule 11	\$ 69,617.17
Less: Long-term capital gain (schedule 14).....	40,330.43
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Ordinary net income	\$ 29,286.74
Less: Personal exemption	2,500.00
<hr/>	
Surtax net income	\$ 26,786.74
Less: Earned income credit	300.00
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Balance subject to normal tax.....	\$ 26,486.74
<hr/>	
Normal tax at 4% on \$26,486.74.....	\$ 1,059.47
Surtax on \$26,786.74	2,389.48
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Partial tax	\$ 3,448.95
Add: 30% on long-term capital gain	12,099.13
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Total alternative tax	\$ 15,548.08
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Total tax liability (lesser amount).....	\$ 15,548.08
Tax liability limited to amount determined in statutory notice	\$ 15,533.84
Tax assessed, account No. 852592	6,327.02
Deficiency	\$ 9,206.82

Schedule 14
Long-term Capital Gain

	Individual	Trust-5/7	Total
Reported in return	\$29,694.55	\$3,969.91	\$33,664.48
Increase, statutory notice	5,907.89	767.80	6,675.69
Decrease, schedule 11(a) and (b)	(8.67)	(1.05)	(9.72)
Total	\$35,593.77	\$4,736.66	\$40,330.43

[243]

EXHIBIT A

Marathon Paper Mills Company Bond and Stock
Received October 31, 1927 in Exchange for
3,357 Shares of Menasha Carton Company
Stock

Value of 3,357 shares at \$50.00 a share (Court's opinion)	\$167,850.00
6,795 shares common stock for 48.033% of \$167,850.00	\$ 77,266.39
Basis per share of stock	\$11.37106
10/31/27 (767) shares sold at	\$11.37106 (8.721.60)
6028 shares at	\$11.37106 \$ 68,544.79
12/ 2/29 18084 shares for 4 for 1 split-up	0
24112 shares at	\$ 2.84276 \$ 68,544.79

2/9/32	(5000) shares gift to Gertrude H. Gaylord at	\$ 2.84276	(14,213.80)
11/35	19,112 shares at	\$ 2.84276	\$ 54,330.99
	(700) shares sold at.....	\$ 2.84276	(1,989.93)
11/7/35	18,412 shares at	\$ 2.84276	\$ 52,341.06
	(5,000) shares to Gaylord Trust at	\$ 2.84276	(14,213.80)
	13,412 shares remaining at	\$ 2.84276	\$ 38,127.26
	Basis per one share of stock	\$ 2.84276	
	Basis per share, statutory notice		2.83542
	Increase in basis per share.....		\$ 0.00734

[Endorsed]: T.C.U.S. Filed July 13, 1944. [244]

The Tax Court of the United States
Washington

Docket No. 109273

GERTRUDE H. GAYLORD,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
DECISION

Pursuant to the Court's Findings of Fact and Opinion, promulgated February 18, 1944, the respondent herein having filed a recomputation of tax on May 17, 1944, and the petitioner having

filed an acquiescence in said recomputation on June 19, 1944, it is

Ordered and Decided: That there are deficiencies in income tax, as follows:

Year	Deficiency
1936	\$1,087.10
1937	4,922.60
1938	None
1939	1,998.19

Entered July 14, 1944.

(Seal) (Sgd.) BOLON B. TURNER
Judge.

Copies served on both parties. [245]

The Tax Court of the United States
Washington

Docket No. 109138

GEORGE S. GAYLORD,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Court's Opinion, promulgated February 18, 1944, the respondent having filed a revised recomputation of tax on July 13, 1944, and the petitioner having filed an acquiescence in said recomputation on August 2, 1944, it is

Ordered and Decided: That there are deficiencies in income tax, as follows:

Year	Deficiencies
1936	\$17,826.37
1937	12,029.07
1938	8,211.85
1939	9,206.82

Enter:

Entered Aug. 4, 1944.

(Seal) (Sgd.) BOLON B. TURNER
Judge. [246]

In the United States Circuit Court of Appeals
for the Ninth Circuit

The Tax Court of the United States

Docket No. 109138

GEORGE S. GAYLORD,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW OF DECISION OF
THE TAX COURT OF THE UNITED
STATES

To the Honorable United States Circuit Court of
Appeals for the Ninth Circuit and the Judges
Thereof:

Comes now your petitioner George S. Gaylord

(hereinafter called petitioner or Mr. Gaylord), by Thomas A. J. Dockweiler and James W. Bontems C.P.A., his attorneys, and files with the clerk of The Tax Court of the United States his petition for review of the decision of The Tax Court of the United States and the Honorable Bolon B. Turner, a judge of said court, entered August 4, 1944, hereinafter referred to, and respectfully shows:

I.

COURT IN WHICH REVIEW IS SOUGHT
AND JURISDICTION

This is a proceeding for review by the United States Circuit Court of Appeals for the Ninth Circuit of a decision [247] of The Tax Court of the United States entered August 4, 1944, determining against petitioner a deficiency in his income taxes of \$17,826.37 for the taxable year 1936, of \$12,029.07 for the taxable year 1937, of \$8,211.85 for the taxable year 1938 and of \$9,206.82 for the taxable year 1939. However, this proceeding for such review concerns as to such deficiency for the taxable year 1937 only \$11,965.36 of said sum of \$12,029.07, as to such deficiency for the taxable year 1938 only \$8,074.13 of said sum of \$8,211.85 and as to such deficiency for the taxable year 1939 only \$7,925.35 of said sum of \$9,206.82, petitioner having since said decision of said Tax Court was so entered and prior to the filing of this petition paid to the Collector of Internal Revenue at Los Angeles, California, \$63.71 on said sum of \$12,029.07,

\$137.72 on said sum of \$8,211.85 and \$1,281.47 on said sum of \$9,206.82, together with interest as provided by law on all of such sums so paid to the date of such payment thereof. Petitioner is an individual and is now and at all times since prior to the year 1936 has been a resident of the City of Pasadena, in the County of Los Angeles, in the State of California. The respondent herein (hereinafter called Commissioner) is the duly appointed, qualified and acting Commissioner of Internal Revenue appointed and holding his office by virtue of the laws of the United States of America. Petitioner filed with the Collector of Internal Revenue for the Sixth District of California, at Los Angeles, California, his (petitioner's) individual returns of the income taxes in respect of which the aforementioned [248] deficiency was so determined by The Tax Court of the United States. Said district and the office of said Collector of Internal Revenue are located within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit. Jurisdiction of said United States Circuit Court of Appeals for the Ninth Circuit to review the above referred to decision of The Tax Court of the United States is provided for in Sections 1100, 1141 and 1142 of the United States Internal Revenue Code.

II.

PRIOR PROCEEDINGS

On September 17, 1941, Commissioner mailed to petitioner a notice of deficiency in which Commis-

sioner advised petitioner that the determination of his income liability for the taxable years 1936 to 1939, inclusive, disclosed a deficiency of \$49,518.76, or \$17,835.82 for 1936, \$12,033.50 for 1937, \$10,-442.62 for 1938 and \$9,206.82 for 1939. On November 10, 1941, petitioner filed with the United States Board of Tax Appeals (now The Tax Court of the United States) his verified petition for a redetermination of such deficiency. Commissioner filed with said Board his answer to said petition on December 9, 1941. On September 17, 1941, Commissioner also mailed to Gertrude H. Gaylord, petitioner's wife (hereinafter referred to as Mrs. Gaylord) a notice of deficiency in which Commissioner advised her that the determination of her income tax liability for the taxable years 1936 to 1939, inclusive, disclosed a deficiency of \$8,043.63, or \$1,-087.40 for 1936, \$4,925.01 for [249] 1937, \$32.51 for 1938 and \$1,998.71 for 1939. On November 26, 1941, she filed with said Board her verified petition for a redetermination of such deficiency; to which petition Commissioner filed his answer on January 2, 1942. As the issues of fact and law involved in the case made by Mrs. Gaylord's petition and Commissioner's answer thereto were the same as certain issues of fact and law (except for differences in total amounts of money or value concerned) as those arising from Mr. Gaylord's said petition and Commissioner's answer thereto, said Court consolidated the two cases for hearing and they were heard together by said Tax Court, the Honorable Bolon B. Turner, a judge thereof pre-

siding, on April 2 and 3, 1943, at Los Angeles, California. On February 18, 1944, that court, by said judge, promulgated its findings of fact and opinion deciding against Mr. and Mrs. Gaylord the issues of fact and law now brought up by Mr. Gaylord in this petition for review. Though they moved for reconsideration by said Tax Court of its determination, so announced, that (1) the income for the years 1936 through 1939 of the hereinafter referred to trust was taxable to Mr. and Mrs. Gaylord and (2) the basis for computing gain on certain stock sales by them and said trust during said years was less than the value claimed by the taxpayers, which motion was filed with said court March 17, 1944, it denied such motion March 18, 1944. The hereinbefore stated decision of which review is now sought followed on August 4, 1944. The controversy involved in this review concerns only a part of the issues which were before said Tax Court in those proceedings; [250] said decision of said Tax Court on the issues with which said controversy is concerned resulting in a deficiency, as so determined by it, of \$17,826.37 for the taxable year 1936, \$11,965.36 for the taxable year 1937, \$8,074.13 for the taxable year 1938 and \$7,925.35 for the taxable year 1939.

III.

NATURE OF THE CONTROVERSY

The nature of the controversy involved in this proceeding for review, stated as briefly as its factual background permits, is as follows:

There are two principal questions, which are the same as those presented in petitioner's above mentioned motion for reconsideration: (A) Was said trust at any time during the years 1936 through 1939 revocable by the trustors thereof, Mr. and Mrs. Gaylord, or other of them, and hence the trust income for those years taxable to them, and (B) what was the basis for computing gain on certain stock sales made by Mr. and Mrs. Gaylord and said trust during said years?

A. Question of Revocability of the Trust.

In the year 1935, prior to the execution and acknowledgment of the declaration of trust dated November 7, 1935, hereinafter referred to, it was agreed between Mr. and Mrs. Gaylord that if he would contribute to an irrevocable trust to be created for the uses and purposes and upon the terms and conditions set forth in such declaration 5000 shares of Marathon Paper Mills Company common stock owned by him as his separate property, such shares to be a part of the trust [251] estate to be provided for in such trust, she would contribute to such trust as a part of such trust estate in trust for the same uses and purposes and upon the same terms and conditions 2000 additional shares of such stock owned by her as her separate property, and, reciprocally, that if she would make such contribution he would make such contribution of 5000 shares. Accordingly they instructed their attorney to prepare a declaration of trust for such an irrevocable trust. He thereupon prepared a declara-

tion of trust dated November 7, 1935, which Mr. and Mrs. Gaylord signed about December 11, 1935. On that day they acknowledged before a notary public in Los Angeles County, California, its execution and left it in the attorney's custody, where it remained until the above mentioned hearing before said Tax Court. Pursuant to their precedent agreement Mr. Gaylord contributed his 5000 and Mrs. Gaylord her 2000 shares of Marathon Paper Mills common stock to such trust in the year 1935. Both of them in creating said trust (hereinafter referred to as the trust) proposed, intended and understood that they were creating an irrevocable trust of that stock and its proceeds for the uses and purposes and upon the terms and conditions set forth in said declaration and that neither they nor either of them had any power to revoke such trust or to make any change therein. In connection with their execution of said declaration their said attorney advised them that the trust was irrevocable. Upon acquisition for the trust by its trustees, with proceeds of sale of certain of the stock thus contributed, of real property in the jurisdictions hereinafter named, said declaration was [252] recorded in 1937 in the office of the County Recorder of Los Angeles County, California, and in 1938 in the respective offices of the clerks of the county courts of Cameron, Hidalgo, Potter and Jim Wells Counties, Texas. For such Texas recordings there was an additional acknowledgment of execution of said declaration by Mr. and Mrs. Gaylord and certification thereon of such

acknowledgment in Texas form on January 6, 1938, before the same notary.

In said declaration of trust Mr. and Mrs. Gaylord (who are therein called "trustee") declared that they hold and will hold said 7000 shares in trust for the uses and purposes and upon the terms and conditions set forth in said declaration, whose salient provisions may be summarized as follows: The trustee (this designation also including all successors in the trusteeship of the trust) shall, during the existence of the trust, take charge of and possess, manage and control all of said shares and all principal proceeds thereof and investments and reinvestments thereof and property substituted for any of said stock, proceeds, investments or reinvestments (all of which are referred to in said declaration as the "trust estate"), collect the income of the trust estate, and invest the trust estate in such manner as the trustee may deem advisable, and for or in connection with any of the aforesaid purposes or any purpose of the trust to sell or otherwise dispose of the trust estate upon such terms and for such consideration as the trustee may deem advisable. From the gross income of the trust estate or, if it be necessary, from the trust estate, the trustee shall [253] pay taxes on the trust estate and may also pay reasonable costs, expenses, charges and liabilities necessarily expended or incurred by the trustee in connection with the collection, care, administration, management or distribution of the trust estate or income

thereof and also, if the trustee is a corporation or person or persons other than Mr. or Mrs. Gaylord, reasonable fees or compensation for the services of the trustee in the administration of said trust. The entire net income received from the trust estate and available for distribution shall be distributed by the trustee, either monthly, quarterly or semi-annually as the circumstances and conditions of the trust estate will most conveniently permit, but in any event annually to Margaret Gaylord Ruppel (hereinafter referred to as Mrs. Ruppel) and Gertrude Gaylord (hereinafter referred to as Mrs. Bruce), who are the daughters of Mr. and Mrs. Gaylord, and the survivor of said daughters, share and share alike, while both are living. In the event of the death of either of them leaving lawful issue then such issue, so long as it shall continue to live during the existence of the trust, shall be entitled by right of representation to the share of such net income which the daughter so dying would have been entitled to if she had continued to live. The trust shall ipso facto terminate upon the attainment of the age of thirty years by Mrs. Bruce or her death prior thereto. Upon such termination all of the trust estate then in the possession or control of the trustee as the same then exists shall immediately vest in and be delivered by the trustee to said two daughters or the [254] survivor of them living at the time of such termination, share and share alike, if both of them shall then be living. However, in the event of the death of either of them prior to such termination leaving her surviving at the time of such termination lawful issue then the share of

the trust estate she would have taken if she had been living at such termination shall upon such termination immediately vest in and be delivered by the trustee to such lawful issue by right of representation. If upon the termination of the trust there shall then be living neither of said daughters nor any lawful issue of them, then upon such termination the trust estate shall vest in and be delivered to Mrs. Gaylord. Every beneficiary of the trust is restrained from in any manner anticipating, encumbering or alienating any right, interest or estate in principal or income of the trust. In distributing principal of the trust estate the trustee shall determine the method or procedure to be followed and shall execute all instruments necessary to confirm in the distributee title and possession to principal distributed. Invalidity of any provision of the trust, if ever decreed by a court of competent jurisdiction, shall not vitiate such as are valid. Mr. and Mrs. Gaylord, or either of them, can, with the trustee's written consent, add other property to the trust estate for the same uses and purposes and upon the same terms and conditions set forth in said declaration. Mr. and Mrs. Gaylord, or either of them, can resign at any time as trustee of the trust. Upon death or such resignation of either Mr. or Mrs. Gaylord the other of them shall act as the [255] trustee with all rights, powers, authorities, discretions and exemptions provided for the original trustees of the trust. Mr. Gaylord or in absence of any such appointment by him, Mrs. Gaylord, shall have the right to appoint

successor trustee or trustees of the trust in ~~case~~ neither Mr. or Mrs. Gaylord is acting as trustee. In the event neither of them is so acting and there is no such appointment The Northern Trust Company, of Chicago, Illinois, and any successor or assign of it shall ipso facto succeed as trustee of the trust. Finally, no security shall ever be required of the trustee for the performance of any duty or trust under said declaration. Though said declaration contained no statement that it was irrevocable, no right to change or revoke the trust was reserved.

In connection with the creation of the trust and as a part of the same transaction Mr. and Mrs. Gaylord each personally signed and under date of February 3, 1936, executed under oath a gift tax return for the calendar year 1935, which was filed in the office of the Collector of Internal Revenue at Los Angeles, California, March 10, 1936. Mr. Gaylord's said return included his contribution to the trust of his 5000 shares of Marathon Paper Mills common stock mentioned in said declaration of trust, and Mrs. Gaylord's said return covered her 2000 shares of such stock appearing in said declaration of trust. In each such return specific reference was made to the trust and it was expressly declared that the "gift" represented by the declarant's aforesaid contribution to the trust was made "By the creation of an irrevocable trust for the benefit of another." [256] The only trust to which reference was made in said gift tax returns was the trust provided for in said declaration of trust dated November 7, 1935. There was no other trust

then in existence. All entries in said returns are in Mr. Gaylord's own handwriting. Mr. Gaylord upon so filing his said return paid a gift tax shown thereon in the amount of \$2,531.27 and later under date of December 28, 1936, paid to said collector an additional tax of \$90.05 assessed on said return. No part of any gift tax so paid was ever refunded to Mr. Gaylord. Because of exemptions and exclusions no gift tax was payable by Mrs. Gaylord on her said return.

In the beginning of the year 1940, long before any question was raised as to the revocability or irrevocability of the trust, Mr. and Mrs. Gaylord, upon advice of counsel and out of an abundance of caution, signed and executed a certain Declaration Being a Part of a Certain Declaration of Trust Dated November 7, 1935, which was dated November 7, 1935, and acknowledged and sworn to by them under date of March 27, 1940, before a notary public in Los Angeles County, California, and recorded in the office of the county recorder of that county March 28, 1940. In this instrument, after referring to said declaration of trust dated November 7, 1935, hereinbefore summarized, Mr. and Mrs. Gaylord declare that the trust provided for in said declaration was always intended and is intended by them to be and is and shall always be absolutely irrevocable and that such further declaration is and is intended to be and shall always be a part of and taken with and construed as [257] a part of said declaration of trust the same as though it

had been physically incorporated in said declaration of trust.

Of the two first named beneficiaries of the trust, Mrs. Ruppel was born November 10, 1904, and Mrs. Bruce May 31, 1916. Both of them are living and each of them has lawful issue living. Mrs. Ruppel, by a first marriage, had two children, Barbara Brunker, born October 14, 1925, and Robert Henry Brunker, born June 3, 1928, both still living. Mrs. Bruce married May 29, 1937, and has as issue thereof a daughter Ann Bruce, born in April, 1938, and still living.

The above mentioned 7000 shares of Marathon Paper Mills common stock referred to in said declaration of trust dated November 7, 1935, were subsequently sold by Mr. and Mrs. Gaylord as trustees of the trust as follows: 4000 in the year 1936, 1600 in the year 1937, 1000 in the year 1938, and the remaining 400 in the year 1939. Such sales were shown in the fiduciary returns of the trust's income for those years by Mr. and Mrs. Gaylord as such trustees.

Until so sold the certificates for such shares were kept in a safe deposit box in the State of California under the name of the trustees of said trust. All of said 7000 shares were so sold and delivered upon sale either in Chicago, Illinois, or the City of New York, New York. It was only in Chicago or New York that sales of such shares were made by said trustees. All such sales were made for cash, all of which was deposited by said trustees in the Harris Trust & Savings Bank in Chicago, Illinois.

The funds of the trust in the years 1936, 1937 and 1938 were kept on deposit in the names of said trustees as such trustees with said Harris Trust & Savings Bank in Chicago, Illinois. In the years 1939, 1940 and 1941 all of the bank accounts of the trust were kept with that bank and with Bankers Trust Company in said City of New York.

During the year 1938 over \$94,000.00 of the proceeds of sales of Marathon Paper Mills stock belonging to the trust theretofore made was invested by Mr. and Mrs. Gaylord as trustees of the trust in, and by way of purchase for the trust of, certain improved income producing real properties in the State of Texas, such properties being located in the Cities of Amarillo, Alice, McAllen and Harlingen in that state. The title to such property so purchased was taken in the name of Mr. and Mrs. Gaylord as such trustees. Said real property ever since has been owned and held by the trustees of the trust for the benefit of the trust and its beneficiaries.

All of the rents belonging to the trust received by its trustees from the above mentioned real property in the State of Texas in the years 1938 and 1939 were included in the fiduciary returns by said trustees of the income of the trust for said years. The net rents from said real property so included amounted to \$3,859.95 for the year 1938 and \$6,370.67 for the year 1939.

Each of the two beneficiaries of the trust, Mrs. Ruppel and Mrs. Bruce, who were then en-

titled to all of the net income thereof in equal shares between them, included in her individual income tax return for each of the years 1936, 1937, 1938 and [259] 1939 her one-half share of the net income of the trust for that year as shown by the fiduciary return of the trustees of the trust for that year, including her share of the net income of the trust from the rents from said Texas real property, and paid to the Collector of Internal Revenue at Los Angeles, California, with whom all of said individual and fiduciary returns were filed, income tax on her one-half of the net income of the trust. Such income included her share of the taxable capital gain, as shown on said fiduciary returns, on the above mentioned sales in the years 1936 to 1939, inclusive, of the 7000 shares of Marathon Paper Mills Company common stock belonging to the trust.

On the foregoing facts respondent Commissioner determined and contended before The Tax Court of the United States that the trust was revocable by Mr. and Mrs. Gaylord, or either of them, at all times during the years 1936 through 1939 and, consequently, under the provisions of Section 22(a) and/or Section 166 of the Revenue Acts of 1936 and 1938 and/or the same sections of the Internal Revenue Code, all of the net income of the trust for those years, which in those years had been distributed by the trustees of the trust to the beneficiaries thereof, Mrs. Ruppel and Mrs. Bruce, constituted income of Mr. and Mrs. Gaylord in the

relative proportions of their respective contributions to the trust, that is, two-sevenths to Mrs. Gaylord, because she had contributed 2000 of the 7000 shares of Marathon Paper Mills Company stock to the trust, and five-sevenths to Mr. Gaylord, because he had contributed the other [260] 5000 shares of such 7000 shares forming the original corpus of the trust, and that, accordingly, petitioner Mr. Gaylord was chargeable for the year 1936 with \$31,284.44 of the trust's net income, for the year 1937 with \$23,620.76 of the trust's net income, for the year 1938 with \$14,446.25 of the trust's net income and for the year 1939 with \$18,001.89 of the trust's net income. On the contrary, petitioner contended to the Commissioner, and before said court, and now maintains that the trust has always been and is irrevocable and that none of the income thereof was ever taxable to him.

B. Question as to Basis for Computing Gain on Stock Sales.

In addition to the sales made by the trustees of the trust in the years 1936 through 1939 of Marathon Paper Mills Company stock belonging to it, petitioner sold in 1936 4950 shares of such stock then owned by him as his separate property, in 1937 2800 shares of such stock similarly owned by him, in 1938 3300 shares of such stock similarly owned and in 1939 2362 shares of such stock similarly owned. The 2000 shares of said stock contributed by Mrs. Gaylord to the trust in 1935 had been received by her as a gift from Mr. Gaylord in 1930. It is conceded that all of the 7000 shares

belonging to the trust and constituting the original corpus thereof have the same basis for computing gain on such sales which they had when they belonged to Mr. Gaylord before he gave them to Mrs. Gaylord. All of the aforementioned shares have the following history:

On July 1, 1917, Mr. Gaylord was the owner of 337 shares (which purchased at various times in the period from previous to [261] March 1, 1913, to July 1, 1917, had cost him \$34,436.50) and his partner, H. S. Clinedinst (hereinafter referred to as Clinedinst) was the owner of 337 shares of the 726 shares of common stock of Menasha Carton Company, the remaining 52 shares being owned by other individuals. Clinedinst also owned all of the stock of Menasha Printing Company. The respective places of business of these two companies, Menasha Carton Company and Menasha Printing Company, were across the street from each other in Menasha, Wisconsin. Clinedinst desired to consolidate or merge the assets and businesses conducted by these two corporations into a new corporation with Mr. Gaylord as its manager. For that purpose an agreement was entered into between Clinedinst and Mr. Gaylord for such consolidation or merger (hereinafter referred to as "consolidation") of said two companies, which resulted in the creation of the Menasha Printing and Carton Company. The agreement provided, among other things, that Mr. Gaylord should acquire sufficient of the stock of the new corporation

to bring his holdings therein up to 40% of its outstanding stock.

By way of convenience for determining between the stockholders of the Menasha Carton Company and of the Menasha Printing Company the respective proportions of interest of each of such stockholders in the new Menasha Printing and Carton Company (but not the real values involved) going into and resulting from such consolidation, an appraisal was made at the time, by a competent appraisal company, of the tangible assets of the Menasha Carton Company and the Menasha Printing Company and the values shown [262] by such appraisal plus the "quick assets" of the two companies involved was the gauge used for determining as between each of the stockholders of these two companies his proportion of interest in the new company.

The consolidation was effected in August, 1917, as of July 1, 1917. In such consolidation Mr. Gaylord received for his above mentioned 337 shares of Menasha Carton Company stock and his promissory note for \$152,161.11 dated August, 30, 1917, payable to the order of Clinedinst three years after date with interest at six per cent per annum (which note was paid in full in 1924), 1975 shares of the common and 410 shares of the preferred stock of the new company, Menasha Printing and Carton Company. The par or stated value of said 1975 shares of common and 410 shares of preferred stock was equal (approximately) in amount to said prin-

cipal sum of said promissory note plus the value of the proportionate part of the tangible assets of the two combined companies as so appraised and their "quick assets", to which Mr. Gaylord's interest in the Menasha Carton Company entitled him. His said 337 shares of that company then had a real and actual value far in excess of that determined by such appraisal of tangible assets plus such "quick assets", which determination was resorted to only for the purpose of fixing the proportion and not the real or actual value of the participation in the new Menasha Printing and Carton Company of the several owners of the two companies which were being consolidated into it. For such purpose no account was taken of the goodwill, earning capacity or value as a profitable going concern of either of the two companies which entered into the consolidation. The profits of the Menasha Carton Company for the first seven months of 1917 were \$56,000, and of the Menasha Printing Company for the first six months of 1917, \$187,000, in round figures. The combined profits at the end of 1917 for these two concerns operated separately for the first six months of that year and of the new company for the last six months of that year was \$315,000.00 in round figures. Determination of the value of the stock of the Menasha Carton Company and Menasha Printing Company through capitalization of such current earnings at ten times the amount thereof, a conservative rate, and taking into consideration such goodwill, earning capacity and value of their businesses as profit-

able going concerns results in a substantially higher value for such stock than that indicated by value of tangible assets and "quick assets" only. Such determination, taking into consideration all of the pertinent factors or elements, including not only value of tangible assets and "quick assets", but as well goodwill, earning capacity and worth as profitable going concern and business, demonstrates a value of at least \$350,000.00 for Mr. Gaylord's said 337 shares of Menasha Carton Company at the time of such consolidation.

In making the consolidation, the appraised value of the physical assets plus book value of the "quick assets" of the Menasha Carton Company was determined to be \$186,000.00, while the appraised value of the physical assets plus book value of the "quick assets" of the Menasha Printing Company was determined to be \$774,000.00, a total of \$960,000.00. For all of [264] the assets of these two corporations, including goodwill, earning capacity and value as going concerns, the new corporation, Menasha Printing and Carton Company, issued 5000 shares of common and 4600 shares of preferred stock all of the par value of \$100 per share. Of the \$186,000.00, value of tangible and "quick assets" of the Menasha Printing Company, \$86,338.84 + was allocated to Mr. Gaylord's 337 shares of stock of that company. Based on the proportion of \$86,338.84 + to \$774,000.00, Mr. Gaylord was entitled to receive for his 337 shares of Menasha Carton Company stock 449.6815 shares of common and 413.7074 shares of preferred stock of the new corporation. However,

for said 337 shares he received 410 shares of the preferred and 453.3889 shares of the common stock of that company. Gaylord purchased in this transaction sufficient additional shares of such common stock to increase his common stock holdings in the new corporation to 1975 shares.

Though the exchange of his 337 shares of Menasha Carton Company stock for stock in the new corporation resulted in taxable gain to him, Mr. Gaylord, through inadvertence and mistake, did not report in his income tax return for 1917 any income on such exchange. In 1922 or 1923 Mr. Gaylord purchased the remaining interest of Clinedinst in the Menasha Printing and Carton Company. In the meantime all preferred stock issued in the above referred to 1917 consolidation had been retired. During the interval between such consolidation and October 31, 1927, Mr. Gaylord sold to employees some small lots of his common stock of Menasha Printing and Carton Company. In 1925 he received a [265] 100% stock dividend on the stock of that company he then held. As of date October 31, 1927, he owned and held 3357 shares of such stock.

Of the stock so held, 350 shares had been transferred by Mr. Gaylord in 1925 to his brother C. W. Gaylord for 432 shares of Robert Gaylord, Inc. stock. Thereafter C. W. Gaylord wanting to reacquire said 432 shares of Robert Gaylord, Inc. for use in connection with reorganization of the latter corporation, Mr. Gaylord proposed to sell

such shares to C. W. Gaylord for \$300,000.00 but the offer was not accepted and thereafter C. W. Gaylord proposed that the previous exchange of 350 shares of Menasha Printing and Carton Company for the 432 shares of Robert Gaylord, Inc. stock be cancelled and the parties restored to the position they would have been in if the exchange had not been made. This was done and Mr. Gaylord returned to C. W. Gaylord the 432 shares of Robert Gaylord, Inc. stock and received back 352 shares of Menasha Printing and Carton Company stock, each of the parties paying over to the other all dividends received by him on the stock involved in the exchange standing in his name during the interval. These exchanges between Mr. Gaylord and C. W. Gaylord were taxable although, through inadvertence and mistake, not considered so by Mr. Gaylord at the time.

On October 31, 1927, Menasha Products Company (such then being the name of Menasha Printing and Carton Company) was merged with Marathon Paper Mills Company. In this tax-free reorganization Mr. Gaylord received 6728 shares of the Marathon Paper [266] Mills Company stock and \$1,038,-000.00 in face value of Marathon Paper Mills Company 5% bonds in exchange for his 3357 shares of common stock of Menasha Products Company. In December, 1929, the last mentioned shares were split four shares for one.

As a result of the foregoing history of the Marathon Paper Mills Company stock sold by the trust and Mr. Gaylord in 1936, 1937, 1938 and 1939, gain

thereon was computed on a basis of \$8.21 per share and income taxes paid accordingly by Mr. Gaylord and the beneficiary daughters of said trust.

On the foregoing facts respondent Commissioner determined and contended before The Tax Court of the United States that for the purpose of computing capital gains realized in the years 1936, 1937, 1938 and 1939 by Mr. Gaylord and the trust from the sales of his and its shares of Marathon Paper Mills Company common stock the statutory basis for computing gain on each such sale was \$2.83542 per share and, consequently, as to such sales there was the following additional gains realized:

On sale in 1936 by the trust of 4000 shares, \$21,498.32, of which 30%, or \$6,449.50, is to be taken into account under section 117(a) of the Revenue Act of 1936;

On sale in 1936 by Mr. Gaylord of 4950 shares, \$26,604.17, of which 30%, or \$7,981.25, is so to be taken into account;

On sale in 1937 by the trust of 1600 shares, \$8,599.33, of which 30%, or \$2,579.80, is so to be taken into account; [267]

On sale in 1937 by Mr. Gaylord of 2800 shares, \$15,048.82, of which 30%, or \$4,514.65, is so to be taken into account;

On sale in 1938 by the trust of 1000 shares, \$5,374.58, of which 50%, or \$2,687.29, is to be taken into account under section 117(b) of the Revenue Act of 1938;

On sale in 1938 by Mr. Gaylord of 3300 shares, \$17,736.11, of which 50%, or \$8,868.06, is so to be taken into account;

On sale in 1939 by the trust of 400 shares, \$2,149.83, of which 50%, or \$1,074.92, is to be taken into account under section 117(b) of the Internal Revenue Code; and

On sale in 1939 by Mr. Gaylord of 2362 shares, \$12,694.77, of which 50%, or \$6,347.38, is so to be taken into account.

To the contrary, petitioner contended to the Commissioner, and before said court, and now maintains that the statutory basis for computing gain on each such sale was \$8.21 per share as claimed in his income tax returns and the fiduciary returns of the trust filed for those years.

On his petition for redetermination of said deficiencies said Tax Court held with respect to the subjects and issues involved in this present proceeding for review by the Circuit Court of Appeals of the United States for the Ninth Circuit [268]

(1) that the trust was revocable during the taxable years 1936 through 1939 and that 5/7ths of the trust income for those years was taxable to the petitioner, and

(2) that the basis for computing gain on the sales by the petitioner individually and by the trustees of the trust of Marathon Paper Mills Company common stock was \$2.84276 per share instead of \$8.21 per share as claimed by petitioner. Accordingly, said Tax Court determined the defi-

iciencies set forth in Subdivision I of this petition, all of which deficiencies result from said two holdings.

IV.

ASSIGNMENTS OF ERROR

In making its decision as aforesaid The Tax Court of the United States committed errors, upon which petitioner relies as the basis of his proceeding herein, as follows, to-wit:

1. Said court erred in deciding that there is a deficiency of \$17,826.37 or any deficiency in income tax of petitioner for the year 1936;
2. In deciding that there is a deficiency of \$12,029.07 or any deficiency in income tax of petitioner for the year 1937;
3. In deciding that there is a deficiency of \$8,211.85 or any deficiency in income tax or petitioner for the year 1938;
4. In deciding that there is a deficiency of \$8,211.85 or any deficiency in income tax of petitioner for the year 1939; [269]
5. In determining that the trust was revocable during the years 1936 through 1939 or at any time in any of said years;
6. In failing to find and decide as a matter of fact and of law that the trust was at all times from its inception in 1935 an irrevocable trust and that all of the income of the trust which was distributed by the trustees to and received by the beneficiaries of the trust in the years 1936, 1937, 1938 and 1939 was income of such beneficiaries and not income of Mr. and Mrs. Gaylord, or either of them;

7. In disregarding the legal effect of the undisputed mutual agreement of Mr. and Mrs. Gaylord for the creation by them of the trust as an irrevocable trust;
8. In failing to distinguish between the effect as to Mr. and Mrs. Gaylord themselves of their contract to create the trust and the result thereof as concerns their daughters and their issue, who are the beneficiaries of the trust;
9. In concluding as a matter of law and deciding that the trust was a "voluntary trust" as that phrase is used in Section 2280 of the Civil Code of California, as amended in 1931;
10. In concluding and deciding, contrary to law, that Section 3399 of the California Civil Code has no application to the trust;
11. In disregarding the fact that it was none of the beneficiaries of the trust who were before said court insisting upon application of said Section 3399 but the two contracting parties, the creators of the trust, Mr. and Mrs. Gaylord, both of whom invoked the protection of that section;
12. In failing to apply to the trust Section 1640 of the California Civil Code and Section 3401 of the same code which, with Section 3399 of the California Civil Code, fully covers the situation of any omission of any express declaration of irreversability in said declaration of trust dated November 7, 1935;
13. In failing to give effect to the gift tax returns of Mr. and Mrs. Gaylord wherein they re-

ferred to and identified the trust as an irrevocable trust;

14. In concluding that estoppel is not an issue in this case and in failing to decide that respondent Commissioner is estopped to claim that the trust was revocable;

15. In disregarding and failing to give effect to undisputed evidence before said court in said declaration of trust and of acts and conduct of the trustees that the trust was intended to be operative under laws of jurisdictions other than California in which other jurisdictions the trust as set forth in said declaration has always been irrevocable;

16. In deciding, contrary to law and to fact, that the \$3,859.95 rent for the year 1938 and the \$6,370.67 rent for the year 1939 of real property in the State of Texas belonging to said trust was income of a revocable trust;

17. In deciding that 5/7ths or any part of the income of the trust for the years 1936, 1937, 1938 and 1939, or any of those years, was taxable to petitioner; [271]

18. In deciding that the basis for computing gain on the above referred to sales of Marathon Paper Mills Company common stock was \$2.84276 per share instead of \$8.21 per share claimed by petitioner, there being no evidence in the record to support any such finding and such finding ignoring the undisputed evidence of real and actual value of the stock of Menasha Carton Company and Menasha Printing Company involved in the exchange resulting in the consolidation of said two

corporations in the Menasha Printing and Carton Company;

19. In failing to find and decide that under Section 202(a) of the 1926 Revenue Act the cost to Mr. Gaylord of the 350 shares of Menasha Printing and Carton Company stock which he received from his brother C. W. Gaylord in 1927 in exchange for 432 shares of Robert Gaylord, Inc. was the market or true values of such shares of Menasha Printing and Carton Company in August, 1927;

20. In holding and deciding that the \$152,161.11 paid by Mr. Gaylord to Clinedinst was the cost of 1525 shares of common stock of Menasha Printing and Carton Company received by Mr. Gaylord in the consolidation of Menasha Printing Company and Menasha Carton Company;

21. The decision of said court for which review is here prayed is not supported by the evidence;

22. Said decision is contrary to the evidence; and

23. Said decision is contrary to the law. [272]

Wherefore, your petitioner George S. Gaylord prays that the United States Circuit Court of Appeals for the Ninth Circuit review the findings of fact and opinion and the decision of The Tax Court of the United States entered August 4, 1944, determining a deficiency in the income taxes of petitioner for the calendar years 1936, 1937, 1938 and 1939, hereinbefore referred to, and reverse and set aside said decision and direct the entry of a decision by The Tax Court of the United States in favor of petitioner determining that there is no

deficiency in his income taxes for the said years 1936, 1937, 1938 and 1939; that a transcript of the record be prepared in accordance with the law and applicable rules and be transmitted to the Clerk of said Circuit Court of Appeals for filing; and for such other and further relief as to said Court may appear proper in the premises.

THOMAS A. J. DOCKWEILER
JAMES W. BONTEMS, C.P.A.
Attorneys for said Petitioner.

State of California,

County of Los Angeles—ss.

Thomas A. J. Dockweiler, being first duly sworn, says: That he is one of the attorneys of record for said petitioner George S. Gaylord in this proceeding and prepared the foregoing [273] petition and is familiar with the contents thereof; that the statements made therein are true to the best of his knowledge, information and belief; that said petition is not filed for the purpose of delay and that said affiant believes said petitioner is justly entitled to the relief sought.

THOMAS A. J. DOCKWEILER

Subscribed and sworn to before me this 3rd day of October, 1944.

(Notarial Seal) J. F. KINMAN

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires August 14, 1946.

[Endorsed]: T.C.U.S. Filed Oct. 11, 1944. [274]

